UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 581—August Term, 1981

(Argued December 10, 1981

Decided September 3, 1982)

Docket No. 81-4186

STEPHEN M. SUNDHEIMER,

Petitioner,

—v.—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

Before:

MOORE, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Petition for review of an order of the Commodity Futures Trading Commission, which revoked petitioner's registration as a floor broker pursuant to §§ 8a(2)(B) & 8(a)(3) of the Commodity Exchange Act, as amended, 7

U.S.C. §§ 12a(2)(B) & 12(a)(3), held that petitioner had violated § 4c(a)(A), 7 U.S.C. §§ 6c(A), imposed a $100,000 penalty, ordered him to cease and desist from further violations of § 4c(a)(A), and prohibited him from trading on or subject to the rules of any contract market for a period of 24 months.

Petition for review denied and order affirmed.

JOHN M. BURNS III, New York, N.Y. (Burns & Fox, New York, N.Y., on the Brief), *for Petitioner.*

GLYNN L. MAYS, Assistant General Counsel, Commodity Futures Trading Commission, Washington, D.C., (Dennis A. Dutterer, General Counsel, Pat G. Nicolette, Deputy General Counsel, Gregory C. Glynn, Associate General Counsel, and Vivian C. Kresslein, Clerk, Washington, D.C., on the Brief), *for Respondent.*

VAN GRAAFEILAND, *Circuit Judge*:

Stephen M. Sundheimer (petitioner) asks this Court to review a final order of the Commodity Futures Trading Commission which revoked petitioner's registration as a floor broker and imposed other sanctions as provided in §§ 6(b) and (c) of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 9 & 13b. We affirm.

In 1974, petitioner, a vice-president of Pressner Trading Corporation, agreed that Pressner would take the other side of certain prearranged contracts in crude oil futures so that an oil company could obtain illegal tax benefits by claiming fraudulent losses. Some time later, the Justice Department commenced an investigation into the use of the crude oil futures market for tax evasion purposes. Petitioner was implicated and thereafter cooperated with the federal authorities.

On October 27, 1978, in the United States District Court for the Southern District of New York, petitioner pled guilty to a charge that he violated 26 U.S.C. § 7206(2) by knowingly aiding, assisting, and advising in the preparation of false and fraudulent income tax returns. On January 9, 1979, petitioner was sentenced to a year in prison and fined $5,000. The sentence of imprisonment was suspended on condition that petitioner devote the year to an approved community activity, which he did.

On January 16, 1979, the Commission's Division of Enforcement filed a complaint alleging that petitioner's felony conviction made him unfit for registration with the Commission. *See Commodity Exchange Act* §§ 8a(2)(B) & (3), 7 U.S.C. §§ 12a(2)(B) & (3). The complaint also alleged that petitioner had violated or aided and abetted violations of section 9(b) of the Commodity Exchange Act, 7 U.S.C. § 13(b), which forbids market price manipulations, and section 4c(a)(A), 7 U.S.C. § 6c(a)(A), which forbids conduct "of the character of" accommodation trades.

The Division of Enforcement moved for summary disposition, contending correctly that, because of petitioner's felony plea, he was collaterally estopped from denying his participation in the prearranged trades. The

Administrative Law Judge, to whom the matter was referred, held that, because petitioner's manipulation of prices did not end prior to April 21, 1975, when the Commission assumed jurisdiction over crude oil future contracts, the provisions of the Act were applicable to him. The Administrative Law Judge also held that a *prima facie* case of unfitness under section 8a(2)(B) had been made out and that both sections 9(b) and 4c(a)(A) had been violated. He granted in part the motion for summary disposition but ordered a hearing so that petitioner could introduce evidence of mitigating circumstances and rehabilitation.

Following the hearing, the Administrative Law Judge held that the evidence of mitigation was insubstantial and the claim of rehabilitation was premature. He suspended petitioner's registration as a floor broker for six months, enjoined him from further violations of the Act, suspended his trading privileges for twenty-four months, and fined him $200,000. On appeal, the Commission reversed the Administrative Law Judge's holding of a section 9(b) violation because petitioner's guilty plea did not encompass all the elements of market manipulation under the Commodity Exchange Act. The Commission held, however, that the transactions covered by the plea were "tantamount to" accommodation trades and violated section 4c(a)(A). The Commission concluded that petitioner's registration should be revoked rather than suspended, reduced the monetary penalty to $100,000, and approved the remaining sanctions.

Petitioner's principal contentions in this Court are that the Commission erred in finding a violation of section 4c(a)(A) and that the sanctions, as imposed, were improper.

The Section 4c(a)(A) Violation

The Commission's summary disposition of the charges against petitioner were based upon his guilty plea. The information to which petitioner pled guilty alleged that he, "together with other persons, fixed, rigged and fraudulently prearranged trades and manipulated the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses for an oil company for the fiscal year ending October 31, 1974 and for the fiscal year ending October 31, 1975, and predetermined gains for the oil company in the following fiscal years." We find no merit in petitioner's claim that he did not thus admit to engaging in any transactions after April 21, 1975, when, pursuant to the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, the newly-created Commission obtained jurisdiction over the crude oil futures market. The transactions charged and admitted went well beyond April, 1975, and summary disposition on the issue of liability therefore was proper.

The Commission's holding that the transactions in question violated section 4c(a)(A) because they were "tantamount to" accommodation trades involved an imprecise, and therefore objectionable, choice of language. Section 4c(a)(A) forbids transactions which are "of the character of" accommodation trades, and it is quite apparent that the Commission equated the terms "tantamount to" and "of the character of". However, the Commission would be well advised to adhere to the language of the statutes they are enforcing.

Petitioner contends, in any event, that the transactions were not of the character of accommodation trades, because, he says, an accommodation trade must be a fictitious transaction, not a real one. The Commission

defines "accommodation trading" as "[w]ash trading entered into by a trader, usually to assist another with illegal trades" and defines "wash trading" in turn as "[e]ntering into, or purporting to enter into, transactions to give the appearance that purchases or sales . . . have been made, usually not resulting in a change in the traders' market position." Committee on Agriculture, Nutrition and Forestry, 95th Cong. 2d Sess., Futures Trading Act of 1978, Glossary of Terms Used in Commodity Futures Trading (Comm. Print 1979). "The essential and identifying characteristic of a 'wash sale' seems to be the *intent* not to make genuine, bona fide trading transactions in stocks or commodities." *Commodity Futures Trading Commission v. Savage,* 611 F.2d 270, 284 (9th Cir. 1979) (quoting *In re Jean Goldwurm,* 7 Agric. Dec. 265, 274 (1948), with emphasis added). It is this intent, the absence of good-faith, arms-length trading, and the undisclosed prearrangement for losses and gains, that demonstrates the "accommodation" nature of the transactions in the instant case.

There is no unconstitutional ambiguity in identifying an accommodation trade in these terms. As a practical matter, *see Cargill, Inc. v. Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971), *cert. denied,* 406 U.S. 932 (1972), Pressner's prearranged transactions in the oil company's stock were accommodations for the oil company, criminally unlawful ones at that. That real sales rather than fictitious ones were contemplated does not change the artificial character of the arrangement. Prior administrative use of the term "accommodation trade" was consistent with this practical, everyday meaning. *See, e.g., In re Julian M. Marks,* 22 Agric. Dec. 761 (1963); *In re Irwin M. Eisen,* 22 Agric. Dec. 758, 759 (1963); *In re Julian M. Marks,* 20 Agric. Dec. 457, 458, 459 (1961).

The Sanctions

Although the sanctions imposed by the Commission were severe, apparently more severe than had been imposed in other cases, they were within statutory limits and constituted a proper exercise of the agency's discretion. *Haltmier v. Commodity Futures Trading Commission,* 554 F.2d 556, 563-64 (2d Cir. 1977); *see Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 187 (1973). The only aspect of the Commission's holding that causes us concern is the arguably short shrift which the Commission gave petitioner's proof of rehabilitation.

It is established practice for the Commission to receive evidence of mitigating circumstances and rehabilitation. *See, e.g., In re Tipton* [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,673, at 22,750 (1978). During a three-day hearing, sixteen witnesses testified on petitioner's behalf. In rejecting petitioner's claim of rehabilitation, the Commission said "that rehabilitation in a case like this requires a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred." Petitioner contends that the Commission thus made the passage of time the determinative factor in the rejection, without giving due consideration to the evidence of rehabilitation.

If petitioner were correct in his construction of the Commission's language, we would be concerned that the Commission had abused its discretion. Time is, however, a relevant factor. The Commission may well be right if it believes that rehabilitation ordinarily does not occur overnight. On the other hand, if the Commission arbitrarily requires that a fixed period of time elapse before evidence of rehabilitation even will be considered, it actually is imposing a sentence in the guise of determining fitness for registration.

Although, once again, the Commission's choice of language leaves something to be desired, we are not persuaded that the Commission has any unpublished rule regarding the minimum passage of time. The Commission stated that it gave serious consideration to the evidence of rehabilitation, and we have no reason to disbelieve it. Petitioner may reapply, of course, for registration. *Silverman v. Commodity Futures Trading Commission,* 562 F.2d 432, 439 (7th Cir. 1977). Should the Executive Director reject petitioner's application without giving him a further hearing on the question of rehabilitation, *see* 17 C.F.R. § 3.20(e)(f), or should the Commission fail to give petitioner a fair hearing accompanied by proper consideration of all the evidence, petitioner's claim of prejudice may then be viewed in a different light. On the present record, we cannot say that the sanctions imposed constituted an abuse of discretion.

Finding petitioner's remaining claims of error to be without merit, we deny the petition for review and affirm the Commission's order.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

A.9

81-4186

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of October, one thousand nine hundred and eighty-two.

STEPHEN M. SUNDHEIMER,

Petitioner,

-v-

No. 81-4186

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner, Stephen Sundheimer,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

Francis X. Gindhart

Francis X. Gindhart
Chief Deputy Clerk

A. 10

81-4186

To be argued by
JOHN M. BURNS, III

United States Court of Appeals

FOR THE SECOND CIRCUIT

STEPHEN M. SUNDHEIMER,

Petitioner,

—against—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

ON PETITION FOR REVIEW FROM THE
COMMODITY FUTURES TRADING COMMISSION

MEMORANDUM ON BEHALF OF PETITIONER

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MEMORANDUM ON BEHALF OF PETITIONER

PRELIMINARY STATEMENT

This is a petition for review of a decision and order (the "Order," JA.8 et seq.,* reported at 2 Comm. Fut. L. Rep. (CCH) ¶21,245 (1981)) issued by the full Commodity Futures Trading Commission (the "CFTC") on September 16, 1981, as amplified by the CFTC's further order (the "Further Order," JA.22 et seq.) dated October 16, 1981. This Court has jurisdiction for this review because petitioner Stephen M. Sundheimer ("Mr. Sundheimer") was doing business in this Circuit. Section 6(b) ("§6(b)") of the Commodity Exchange Act, as amended (the "Act"), [7 U.S.C.A. §9].

ISSUES PRESENTED FOR REVIEW

The following substantial issues are presented for review:

(1) Whether a Federal Agency, on review of a decision by an Administrative Judge, may change the theory of the case and summarily impose harsh sanctions without giving the sanctioned party any prior notice that he is charged with the offense for which sanctions are imposed?

(2) Under a statute mandating a federal agency to hold an adjudicatory hearing prior to imposing sanctions:

(A) Whether a general plea of guilty to a single-count criminal information, containing many elements, any one of which would be sufficient to convict,

* References to the Joint Appendix shall be in the form "JA.__" herein.

establishes all elements charged in the information for collateral estoppel purposes sufficient to support summary judgment?

(B) Whether a party's pleading statement which is subject to a reasonable interpretation not admitting a statutory violation, establishes the commission of such violation sufficient to support summary judgment?

(C) Whether expert testimony is required to establish an alleged violation of a statute prohibiting acts "commonly known to the trade as" an "accommodation trade"?

(3) Whether a Federal Agency may impose harsh sanctions for an act not in violation of its statute or rule on the grounds that the act was "tantamount to" such a violation?

(4) Whether the term "accommodation trade", as prohibited by §4c(a) of the Act includes non-fictitious transactions?

(5) Whether the term "accommodation trade", as prohibited by §4c(a) of the Act and as applied to Petitioner, is void for vagueness under the United States Constitution?

(6) Whether a Federal Agency required to consider substantial evidence of mitigation and rehabilitation from a conviction for aiding or counselling an income tax violation behaves arbitrarily and capriciously in rejecting the evidence under a harsh new rule, announced with no prior notice and after the hearing, that rehabilitation cannot possibly occur in seven years?

(7) Whether a Federal Agency may impose harsh

sanctions without supporting them by adequate findings as to the need for such sanctions?

(8) Whether a Federal Agency may impose harsh sanctions which do not bear a reasonable relation to the purposes of its enabling statute?

(9) Whether a Federal Agency may impose harsh sanctions in a discriminatory manner?

STATEMENT

A. The Underlying Facts.

Mr. Sundheimer, a commodities trader and floor broker for twenty years (JA.537), was, and now is, vice president of Pressner Trading Corporation ("Pressner") (JA.530). Having earned an enviable reputation for integrity and efficiency in his industry, he marshalled impressive support at the CFTC proceedings below from leaders of the commodities industry who have serious vested interests in maintaining the integrity of the commodities market (See Point IV, infra).

In the fall of 1974 Mr. Sundheimer was in an office at Pressner when another Pressner officer, Jules Nordlicht ("Mr. Nordlicht"), discussed with Messrs. Turkish and Pearlmutter, who were not otherwise related to Pressner or Mr. Sundheimer, a proposed transaction in crude oil futures. Crude oil futures were not then subject to federal regulation.* Mr Sundheimer was not a member of the exchange upon which crude oil futures

* Crude oil futures became subject to regulation under the Act after April 21, 1975 when the Commodity Futures Trading Commission Act of 1974 expanded the definition of "commodity" in the Act to include all commodities (see JA.57, n 14; JA.15-16).

were traded (JA.530).

Mr. Nordlicht and the two others agreed that Pressner, as a customer, would accept one side of a certain prearranged crude oil futures trade to provide a tax benefit to one of Mr. Turkish's customers. The trade was to be executed by others, in the form of tax straddles, prior to the end of October, 1974, the tax year-end for one of the participants. A third party, Joseph R. Hamilton, whom Mr. Sundheimer detested and always scrupulously avoided (JA.531-2), was a major participant in the inactive crude oil futures market and had agreed with Mr. Turkish to prearrange these trades in this unregulated commodity (JA.532-3).

It was implicit that the loss side of the straddles would be liquidated prior to Mr. Turkish's customer's 1974 tax year-end and the profit side liquidated as early in 1975 as possible to avoid market fluctuation and a consequent imbalance between the 1974 loss and the 1975 gain (JA.15, n.7). Because he was in the room at the time, Mr. Sundheimer's assent was requested and he gave it (JA.533). Mr. Hamilton obviously did not control crude oil prices because Pressner profited on the transaction and returned the profit (JA.475).

When the Department of Justice commenced its investigation of Mr. Hamilton's and others' use of the crude oil futures market for tax evasion purposes, Mr. Sundheimer came forward before charges against him were imminent or pending (JA.227-8). He spent long hours, including evenings and weekends, helping the government make its cases (JA.230-1).

Mr. Sundheimer himself waived indictment (JA.67) and was charged in a one count information (the "Information") (JA.65)

(a) that he either "did aid, assist, procure, counsel and [or] advise * * *"

(b) the filing of either false tax "returns, affidavits, claims and [or] other documents * * *"

and that in furtherance of the offense he and others "fixed, rigged, and [or] fraudulently prearranged trades" in crude oil futures at unspecified times during 1974 and 1976. Any one item from paragraph "(a)" above coupled with any one fraudulently prearranged trade at any time prior to April 21, 1975, if an "(a)" - "(b)" combination existed, was sufficient to convict. Mr. Sundheimer pleaded guilty (JA.78).

Mr. Sundheimer's plea statement (JA.77) establishes why he pleaded guilty. He was contrite that he had been present and acquiesced when an agreement was made that Pressner accept the other side of a prearranged trade which afforded Mr. Turkish's customer a wrongful tax benefit. Implicit was a similar liquidating transaction in early 1975 (JA.77, 533-4, 15 n.7).

Mr. Sundheimer forthrightly acknowledged being present in the fall of 1974 when the arrangement was reached, agreeing to it and that "implicit in the initial understanding" was a liquidating transaction. Judge Broderick accepted this acknowledgment in response to his inquiry about "consent to a similar [either a liquidating or a new] arrangement for the following year" (JA.533-4, 77).

Judge Broderick sentenced Mr. Sundheimer to one year of community service and fined him $5,000 (JA.64) and Mr. Nordlicht, the active Pressner participant, to two years of such service and fined him $10,000 (JA.532).

Mr. Sundheimer performed his full time community service for the New York State Attorney General conscientiously and well (JA.258-9, 349-51). Mr. Sundheimer also accepted a one-year suspension from the Petroleum Associates of the New York Cotton Exchange, and paid it a $7,500 fine, and accepted a nine-month suspension from the New York Mercantile Exchange (JA.532).

B. The Proceedings Below.

Five years after the event, the CFTC's Division of Enforcement ("DE") commenced proceedings against Mr. Sundheimer

(a) Under Section 8a(3) [7 U.S.C.A. §12a(3)] of the Act ("§8a(3)") to revoke his floor broker registration on the ground of unfitness because of his conviction; and

(b) Under §6(b) for sanctions for aiding and abetting

(i) alleged price manipulation of crude oil futures, Section 9(b) [7 U.S.C.A. 13(b)] of the Act ("§9(b)"); and

(ii) a disjunctive panoply of seven possible alleged violations of Section 4c(a) [7 U.S.C.A. §6c(a)] of the Act ("§4c(a)"), including "accommodation trades" (JA.29).

The complaint did not allege, as the CFTC later decided, however.

that the subject transactions were "tantamount to" a violation (contrast the Complaint, JA.29, with the Order, JA.16, n.9).

DE moved for summary disposition solely upon Mr. Sundheimer's plea of guilty and his plea statement (JA.41-62), offering no expert testimony as to whether the act allegedly aided by Mr.Sundheimer was known to the trade as an "accommodation trade."* The Administrative Law Judge ("ALJ") awarded partial summary disposition in respect of the §6(b) claims. Sustaining the result, but not the ALJ's reasoning, the CFTC held that Mr. Sundheimer's guilty plea and plea statement established that Mr. Sundheimer had entered into prearranged trades in crude oil futures after April 21, 1975 when such futures first became subject to regulation (JA.14-15).

The CFTC accurately observed that a "prearranged trade", however, does not per se constitute a violation of the Act (JA.8, n.1),** and properly held that there was no proof that Mr. Sundheimer's acts constituted market manipulation under §9(b) (JA. 16-17) and that the transactions in question were not "fictitious sales" (JA.16, n.9) and, apparently, not "accommodations trades".

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* The statutory structure would appear to require such expert testimony. §4c(a). Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974); Randolph v. Collectramatic, Inc., 590 F.2d 844 (10th Cir. 1979). The CFTC frequently proffers expert testimony in analogous circumstances. See, e.g., CFTC v. Morgan, Harris & Scott, Ltd., 484 F. Supp. 669, 673 (S D.N.Y. 1979); CFTC v. Goldex Int'l Ltd , [1977-1980 Transfer Binder] Comm. Fut L. Rep. (CCH) ¶20,839 (N.D. Ill. 1979).

** Prearrangement is not a per se evil in the case of auction markets. For example, "Most transactions and 'block' programs in listed common stocks take the form of a series of relatively small transactions on the exchange auction market, or involve pre-arranged 'crosses' on the floor of an exchange." [Emphasis added] SEC: Special Study of Security Markets, reported in 3 Securities Regulation (Prentice Hall, 1979) ¶34,162.

Nevertheless, the CFTC held that the subject transactions were "tantamount to 'accommodation trades'" ("the Tantamount Holding", JA.16, n.9) and on that ground alone prohibited Sundheimer from trading on contract markets for two years, fined him $100,000 and ordered him to cease and desist from further violation of §4c(a) (the "§4c(a) Sanctions").*

The Tantamount Holding was strikingly inconsistent with the proceedings below.** The complaint did not charge that Mr. Sundheimer's acts were "tantamount to" a violation (JA.28,29). The DE's motion for summary disposition did not claim that Mr. Sundheimer's acts were accomodation trades, let alone "tantamount to" such trades (JA.41-62). Mr. Sundheimer's response to the motion, prepared by Kaye, Scholer, Fierman, Hays & Handler, evidences no awareness that any claim was made that the subject transactions were either accomodation trades or "tantamount to" such trades (JA.80-137). Faced with the ALJ's erroneous conclusions that the transaction was a manipulation and fictitious, the CFTC took over one year (JA.5 ¶¶ 57 and 58) from the time the appeal was submitted to conceive the Tantamount

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* Mr. Nordlicht, the active participant on behalf of Pressner, was prohibited from trading for three months, fined $75,000 and ordered to cease and desist (JA.532). In re Nordlicht, 2 Comm. Fut. L. Rep. (CCH) ¶21,027 (1980).

** The venality of DE's present practice of pleading all violations stated in the Act, disjunctively and merely as possibilities, is made eminently clear by this case, since no one apparently took the reference to "accommodation trading" seriously until the CFTC, needing a peg to hang its hat, seized on this camouflaged claim to justify sanctions, even though the Division had never claimed that the acts alleged were "tantamount to" a violation.

Holding and thereby impose sanctions without affording Mr. Sundheimer a hearing.

After a hearing limited to Mr. Sundheimer's mitigation and rehabilitation in respect of the §8a(3) charge for broker registration revocation and sanctions, at which sixteen prominent individuals testified for Mr. Sundheimer and none against (JA.160 et seq., see Point IV, infra), the CFTC held it would not consider this evidence, since rehabilitation requires "a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred * * * " (the "Seven Year Rule", (JA.19, n.13).* The Seven Year Rule is the CFTC's only stated ground for rejecting the impressive evidence of Mr. Sundheimer's rehabilitation and mitigation. Moreover, the CFTC acted under its harsh new rule that revocation was required where it has "any doubt," not just "reasonable doubt," as to the propriety of continued registration (JA.19, n.13). Under §§8a(3) and 6(b) the CFTC permanently revoked Mr. Sundheimer's floor broker registration.**

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* The Further Order clarifies that by this observation the CFTC referred to the time in the fall of 1974 of Mr. Sundheimer's "participation in the prearranged trading scheme" to the time "within the past few weeks [October 16, 1981] that the Commission has actually considered whether Mr. Sundheimer was rehabilitated * * * " (JA.24). That period is seven years

** Mr. Nordlicht's floor broker registration was revoked for only two years through February, 1982 with the understanding that he could reapply then and the subject events could not be the sole grounds to deny registration. In re Nordlicht, 2 Comm. Fut. L. Rep (CCH) ¶21027 (1980)

ARGUMENT

I

THE CFTC DENIED MR. SUNDHEIMER DUE PROCESS OF LAW AND FAILED TO OBSERVE PROCEDURES REQUIRED BY STATUTE IN IMPOSING THE §4c(a) SANCTIONS

The §4c(a) Sanctions are available only in the event of a violation of the Act, §6(b), and may not be imposed simply because of a criminal conviction. Indeed, a federal agency may not "poach on the jurisdiction entrusted solely to a federal district court" and impose sanctions for offenses not entrusted to it by its enabling statute. Steadman v. SEC, 603 F.2d 1126 (5th Cir. 1979), aff'd, ___ U.S. ___, 67 L.Ed.2d 69 (1981).

Each sanction curtails a valuable right protected by the Fifth Amendment to the Constitution ($100,000 of property, Mr. Sundheimer's right to pursue his profession of twenty years and his liberty to enter into contracts). United States v. Robel, 389 U.S. 258, 264 (1967); Greene v. McElroy, 360 U.S. 474, 492 (1959); West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937); Nebbia v. New York, 291 U.S. 502, 527 (1934); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 (2d Cir. 1980).

Mr. Sundheimer was deprived of due process because he was given no notice that the CFTC intended to ground its imposition of sanctions in the Tantamount Holding and he was denied his statutory right to a hearing by a summary disposition based on inconclusive evidence.

A. The CFTC Improperly Denied Mr. Sundheimer Notice of the Claim.

Notice of charges is an essential element of due process. Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

The complaint charged Mr. Sundheimer with market manipulation and, in the disjunctive and merely in the words of the statute, with possibly aiding and abetting one or another of seven* additional separate acts prohibited by the Act (JA.29). On motion for summary disposition, DE claimed only that Mr. Sundheimer had prearranged trades and manipulated markets (JA.42). The ALJ held that MR. Sundheimer had engaged in manipulation and fictitious sales (JA.159).

On appeal, the CFTC rejected these claims and conclusions and, without giving Mr. Sundheimer any notice that a new question was at issue, held that his acts were "tantamount to 'accommodation trades'" (JA.16, n.9). The first clue that Mr. Sundheimer would be sanctioned summarily either under the Tantamount Holding or for accommodation trading was given in the Order which imposed the sanctions.

The meaning of "accommodation trade" is vague (see Point II A, infra); the meaning of "tantamount to 'accommodation trades'" is even vaguer. The statutory scheme suggests, and elementary due process requires under the circumstances, that Mr. Sundheimer should have been given sufficient notice of his risks to permit him to present expert evidence and arguments to

* The seven are "wash sales, cross trades, accommodation trades or fictitious sales," §4(c)(a)(A), and reporting, registering or recording prices which are not bona fide, §4c(a)(C).

show that the subject transaction was not "of the character of or * * * commonly known to the trade as * * * accommodation trade", §4c(a), and its "tantamount". (See Point II(A), infra, for the argument why the transaction was not an accommodation trade or its tantamount.)

An agency may not impose sanctions without first giving the party to be sanctioned notice affording him the opportunity to oppose. Hess & Clark, Div. of Rhodia, Inc. v. FDA, 495 F.2d 975 (D.C. Cir. 1974); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968); NLRB v. Tennsco, 339 F.2d 396 (6th Cir. 1964); NLRB v. Johnson, 322 F.2d 216 (6th Cir. 1963), cert. denied, 376 U.S. 951 (1964).

In Rodale Press, supra, the Court stated the rule which requires that the Order be vacated, as follows:

> "By substituting an issue * * * for the one framed by the pleadings * * *, the Commission has deprived petitioners of both notice and hearing on the substituted issue. The evil at which the statute [the Administrative Procedure Act] strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the opportunity to present argument under the new theory of violation, which must be supplied." 407 F.2d at 1257.

Accord, National Realty & Constr. Co. Inc. v. OSHRC, 489 F.2d 1957 (D.C. Cir. 1973); Bendix Corp. v. FTC, 450 F.2d 534 (6th Cir. 1971); C&C Market, Inc. v. United States 473 F Supp. 519 (E.D. Mo. 1979). In the present proceeding the claim relating to accommodation trades was camouflaged in the mult

element second count of the complaint and, even then, the CFTC substituted a new issue and held without a hearing that Mr. Sundheimer was guilty of an act not even pleaded.

In Johnson, supra, the Court denied enforcement to an NLRB order because the complaint had charged the respondent with refusing to reinstate former striking employees, but the trial examiner had rejected this charge and found the employer guilty of a discriminatory discharge which was not alleged in the complaint. The Court justified its holding on the ground that

> "one cannot be found guilty [by an agency] of an offense not encompassed by the complaint or of which he had no fair notice", 339 F.2d at 399,

because,

> "[t]he right of a defendant to know the issues in an adjudicatory proceeding * * * is a right and not a matter of grace." 339 F.2d at 400.

Accord, Golden Grain Macaroni, supra. The right to prior notice applies even to actions taken by an agency against an individual without an evidentiary hearing, Hess, supra, 495 F.2d at 983.

In Tennsco, supra, the court refused to enforce an order of the NLRB because the NLRB had buried two actual claims of discrimination in 66 claims of which it did not intend to prove 64. The court concluded that this camouflage deprived the defendant of notice of the actual claims against him

Here, no accurate statement of the actual claim (the "tantamount" claim) was made in the complaint; the distant relative of the actual claim was included in one count camouflaged by seven other specious claims. DR did not attempt to prove seven of these claims (including the claim relating to

accommodation trades) and it failed to prove the one it tried to prove (manipulation). The ALJ tried to find two claims (manipulation and fictitious sales) proved (again not including accommodation trading), but he erred in this endeavor.

Mr. Sundheimer did not litigate the issue relating to accommodation trades because it was not raised on the summary disposition motion or in the ALJ's decision. He did not litigate the Tantamount Holding because there was no suggeston whatsoever that he was charged with committing an act "tantamount to" a violation of the Act. Cf. Golden Grain Macaroni, supra.

Accordingly, it is clear that Mr. Sundheimer received no advance notice that he was charged with an act "tantamount to" an accommodation trade.

B. The CFTC Misinterpreted and Misconstrued the Slight Evidence.

The sole evidence upon which the CFTC based its determination that Mr. Sundheimer violated the Act after it became applicable to crude oil futures on April 21, 1975 is the CFTC's debatable inferences from Mr. Sundheimer's plea of guilty to the Information and the transcript of his statement at the time his plea was accepted. These documents do not separately or together support that determination. The evidence being documentary only, this Court may evaluate and weigh it as if receiving it in the first instance.*

* The "weight of evidence" question specified by §6(b) as the standard for review is whether there is "sufficient competent evidence" to support the CFTC's factual conclusion, Wiscone, S.A. v. CFTC, 604 F.2d 764, 767 (2d Cir. 1979). In making the determination, the standard of review is whether the "preponderence' or 'greater weight of the evidence'" after "something (continued)

(i) The Mere Fact of Mr. Sundheimer's Plea Does Not Establish the Commission of Any Act Prohibited By the Act or That Any Act Occurred After April 21, 1975.

Where, as here, the commission of any of several acts referred to in the accusatory instrument would sustain the conviction, a general plea of guilty* or conviction, without more, may not be used in another proceeding to establish under theories of collateral estoppel that any particular one of the acts charged actually occurred. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951); Piper v. United States, 392 F.2d 462 (5th Cir. 1968); United States v. Fabric Garment Co., 366 F.2d 530 (2d Cir. 1966); United States v. Guzzone, 273 F.2d 121 (2d Cir. 1959); United States v. Levinson, 369 F.Supp. 575 (E.D. Mich. 1973); United States v. American Packing Corp., 113 F.Supp. 223 (D.N.J. 1953).

In Emich, supra, the Supreme Court stated the rule which governs the present appeal as follows:

> "* * * a prior criminal conviction may work an estoppel in favor of the Government in a subsequent criminal proceeding [citations omitted]. Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution [citations omitted].

Footnote cont'd:
other than * * * mechanically reweighing the evidence'" for the "'purpose of determining whether the finder of the fact was justified, i.e. acted reasonably, in concluding that the evidence * * * the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings ' [Citations omitted] " Haltmier v CFTC, 554 F 2d 556, 560 (2d Cir. 1977)

* Indeed, there is a persuasive argument that a plea of guilty should be entitled to substantially less weight in establishing an estoppel than should a conviction. 1B Moore's Federal Practice, ¶0.413 at 2707-8

> "* * * A general verdict * * * does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction [citation omitted], such a verdict does not establish that defendants used all of the means or any particular one." 340 U.S. at 568-9.

Here a number of possible acts were charged as occurring both before and after the effective date of the Act purporting to prohibit only some of them, but all acts and dates need not have been proved for conviction. Accordingly, the plea itself did not establish that any particular act was committed or that it was committed after April 21, 1975, the effective date of the Act.

Following Emich many courts have held in multi-overt act situations similar to the present one that a collateral estoppel is not established by a conviction. In Guzzone, supra, this Court held that conviction under a conspiracy charge did not establish any of the overt acts charged except the one as to which testimony was introduced at trial. In American Packing, supra, the court held that a plea of guilty to a conspiracy charge did not establish any overt act alleged since the

> "* * * overt act may be one charged in the indictment, or it may merely be any overt act which has as its purpose the effectuation of the objects of the conspiracy." 113 F.Supp. at 225.

In Levinson, supra, the court held that a general verdict of guilty to a conspiracy charge did not establish the commission of any of the many overt acts charged.

The rule against an estoppel in the present proceeding is not limited to conspiracy cases. In Fabric Garment, supra, this Court held that conviction on a charge of converting approximately 19,000 yards of serge, while creating an estoppel as to the fact of conversion, did not estop as to the quantity since the quantity was not an essential element of the charge. In Piper, supra, the court held that a conviction for filing false excise tax returns in a pleaded amount did not create an estoppel as to the amount of tax due since the "correctness of the Government's assessment was not necessary to convict * * *." 392 F.2d at 464.

Thus, since many acts and many possible times for those acts were alleged in the Information, Mr. Sundheimer's plea of guilty to the multi-element, single count, Information did not itself establish that any particular one of the acts charged in the Information actually occurred at any particular time.

(ii) Mr. Sundheimer's Plea Statment Does Not Establish Any Act Prohibited By the Act or that Any Act Occurred After April 21, 1975.

Mr. Sundheimer's statement that "implicit in" his assent to the pre-October 31, 1974 transaction was assent to the post-October 31, 1974 liquidating transaction does not establish either a violation of the Act or any act occurring after April 21, 1975. The CFTC recognizes that a tax straddle requires a liquidating transaction promptly in the subsequent year (JA.15, n. 7), but the CFTC summarily rejected the logical conclusion that Mr. Sundheimer referred to an early 1975 liquidating transaction without stating any basis for doing so.

Assuming arguendo that Mr. Sundheimer's plea statement were susceptible of interpretation as referring to a post April 21, 1975 transaction, that is only one possible interpretation and establishes only that the statement is ambiguous. An ambiguous statement may not be used to create an estoppel. Kaufman v. Moss, 420 F.2d 1270 (3rd Cir.), cert. denied, 400 U.S. 846 (1970); Kelly v. Illinois Bell Tel. Co., 325 F.2d 148 (7th Cir. 1963); cf. Northern Oil Co. Inc. v. Socony Mobil Oil Co., Inc., 368 F.2d 384 (2d Cir. 1966); McNellis v. First Fed Sav. & Loan Ass'n, 364 F.2d 251 (2d Cir.), cert. denied, 385 U.S. 970 (1966)

In Kaufman, supra, the court stated the rule which governs the present appeal as follows:

> "Reasonable doubt as to what was decided by a prior [criminal] judgment should be resolved against using it as an estoppel." 420 F.2d at 1274.

In Kelly, supra, the court held that a jury verdict in a criminal case could not be used to create an estoppel where it was

> "equally susceptible of diametrically opposed inferences with respect to the basic issue here ***." 325 F.2d at 152.

In Northern Oil and McNellis, supra, this Court applied the same rule to civil judgments, holding that an ambiguity as to what was determined prevented the use of the judgment for collateral estoppel purposes. Even in the case of an unambiguous plea, extraneous circumstances such as the prosecutor's post-conviction admission that he could not have proved all of the elements of an indictment precludes collateral estoppel to establish the elements the prosecutor could not have proved. De Cavalcante v. Commissioner, 620 F 2d 23 (3d Cir. 1980).

Mr. Sundheimer's mere plea to a multi-element criminal income tax Information, any of which elements would support a conviction, and reference to Mr. Sundheimer's plea statement fail to establish by collateral estoppel either an act which would constitute a violation of the Act or that any act complained of was committed after the effective date of the Act. Accordingly, there was insufficient competent evidence to support the CFTC's determination that Mr. Sundheimer violated the Act.

C. The CFTC Improperly Sustained Summary Disposition and Thereby Wrongfully Deprived Mr. Sundheimer of His Statutory Right to any Adjudicatory Hearing.

CFTC hearings are required by §§6(b) and 8a before the CFTC may impose §4c(a) sanctions. The right to a meaningful evidentiary hearing is also an essential requirement of due process. Goldberg v. Kelly, 397 U.S. 254 (1970). Here, partial summary disposition was granted denying Mr. Sundheimer an adjudicatory hearing on every issue arising under §4c(a).

Summary disposition on the §4c(a) claim was granted despite the absence of any dispositive, unequivocal evidence that any act prohibited by the Act was committed, that any subject transaction occurred after April 21, 1975, that any act committed constituted an accommodation trade or that any such act was "tantamount to" an accommodation trade.

Absent dispositive, unequivocal evidence that the Act was violated, the CFTC lacked authority to grant summary disposition and deprive Mr. Sundheimer of his statutory adjudicatory hearing. United States v. Choramie Bo-Truc #5, Inc., 538 F.2d 696 (5th Cir. 1976), Independent Bankers Ass'n. v. Board

of Governors of the Fed. Reserve Sys., 516 F.2d 1206 (D.C. Cir. 1975); Patagonia Corp. v. Board of Governors of the Fed. Reserve Sys., 517 F.2d 803 (9th Cir. 1975).

Since formalities of pleadings and rules of evidence are more relaxed in agency proceedings, an agency "carries a heavy burden of justification", Independent Bankers, supra, 516 F.2d at 1220, in denying a party his statutorily prescribed adjudicatory hearing and such denial "is justified only in exceptional circumstances." Id., n.57. "[T]he agency must show that the parties could gain nothing", Id., by an adjudicatory hearing and

> "[a] petitioner need not make detailed factual allegations in order to meet the requirement that he raise 'issues of material fact.' He need only show that an 'inquiry in depth' is appropriate.' Id., n.57.

See also Cheramie Bo-Truc, supra.

Agency summary disposition motions are analogous to summary judgment motions, Independent Bankers, supra, 516 F.2d at 1220, n.57. The DE did not make a sufficient showing of non-disputed material facts to entitle it to summary judgment. Poller v. Columbia Broadcasting Sys., 368 U S. 464 (1962); United States v. Diebold, Inc., 369 U.S. 654 (1962); Robertson v. Siedman & Seidman, 609 F.2d 583 (2d Cir. 1979); National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023 (D.C. Cir. 1978); United States v. Pent-R-Books, Inc., 538 F.2d 519 (2d Cir. 1976), cert. denied, 430 U.S. 906 (1977); Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317 (2d Cir. 1975); Patagonia Corp. v. Board of Governors of the Fed. Reserve Sys., 517 F.2d 803 (9th Cir. 1975);

Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974); United States v. J. B. Williams Co., Inc., 498 F.2d 414 (2d Cir. 1974); Empire Electronics Co., Inc. v. United States. 311 F.2d 175 (2d Cir. 1962); Doe v. United States Civil Serv. Comm'n, 483 F.Supp. 539 (S.D.N.Y. 1980); Wessinger v. Southern Ry. Co., Inc., 438 F.Supp. 1256 (D.S.C. 1977); Fuller Brush Co. v. United States, 262 F.Supp. 989 (D. Conn. 1966); A. Smith Bowman & Sons, Inc. v. Schenley Distillers, Inc., 190 F.Supp. 586 (D. Del. 1961).

In Henderson, supra, this court remanded the matter for a hearing where the "reasonably probably interpretations" of a certain statement were, as here, the opposite of the interpretation assumed by the agency. 501 F.2d at 1230. In Patagonia, supra, the court stated the rule applicable on the present review as follows:

> "Disputed questions of adjudicative fact normally are not decided without affording to the party that may be adversely affected as evidentiary hearing in which that party has the opportunity to confront witnesses and to hear and contest the evidence against him." 517 F.2d at 816.

Summary judgment is an issue finding, and not an issue determining procedure. Thus, the Supreme Court has established strict requirements for a summary disposition of any adjudicatory matter stating that summary judgment is to be granted

> "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial * * * if they really have issues to try.'" Poller, supra, 368 U.S.

> at 468, quoting from Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944) [Excisions, except as marked by "***", and bracket insertions by the Court.]

Where, as here, it was not "quite clear what the truth is" and at least three "genuine issue[s] remain for trial," it was inappropriate to grant summary disposition. The rule against summary disposition is applicable even absent the right to jury trial. J.B. Williams, supra, 498 F.2d at 430, n.19.

Courts have consistently held that "on motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried." Heyman, supra, 524 F.2d at 1319-20, and cases cited therein. As stated in Campbell, supra,

> "Summary judgment is unavailable if it depends upon any fact that the record leaves susceptible of dispute." [Emphasis added] 593 F.2d at 1027.

The right to summary judgment must be established

> "with such clarity as to leave no room for controversy". [Emphasis added.] Traylor v. Black, Sivalls & Bryson, Inc., 189 F.2d 213, 216 (8th Cir. 1951). Accord, Campbell, supra, 593 F.2d at 1027; Seaman v. Mumford, 335 F.2d 704, 705 (D.C. Cir. 1964). See also Wessinger, supra, 438 F.Supp. at 1259.

If there is "any" or the "slightest doubt," the motion must be denied, Doehler Metal Furniture Co., Inc. v. United States, 149 F.2d 130, 135 (2d Cir. 1945); Doglow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1971); Wessinger, supra, 438 F.Supp. at 1259, and, of course, the evidence in the record must be "viewed in the light most favorable to the party opposing the motion". Diebold, supra, 369 U.S. at 655.

Moreover, in a case such as the present one based en-

tirely upon the CFTC's debatable inferences drawn from the ambiguous plea and plea statment, summary disposition must be denied because,

> "the inferences to be drawn from the underlying facts contained in such materials [affidavits exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion". Diebold, supra, 369 U.S. at 655,

and

> "[w]hen conflicting inferences can be drawn from the facts, however, summary judgment is inappropriate." Robertson, supra, 609 F.2d at 591.

As stated in Empire, supra, the evidence must be viewed, "giving the opponent [on summary disposition] the benefit of all favorable inferences that may reasonably be drawn," 311 F.2d at 180, and

> "'[i]f, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.'" Empire, supra, 311 F.2d at 180, quoting from Ramsouer v. Midland Valley R. Co., 135 F.2d 101,106 (8th Cir. 1943).

Indeed, inferences must be viewed in favor of the party opposing summary judgment even though the party's "prospect of ultimate success on the merits might be viewed as small." Dolgow, supra, 438 F.2d at 830. As stated in Wessinger, supra,

> "'Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom * * *'" 436 F.Supp. 1259, quoting from Phoenix Sav. and Loan, Inc. v. Aetna Casualty and Surety Co., 381 F.2d 245, 249 (4th Cir. 1967). See also Doe, supra, 483 F.Supp. at 555.

Here, the sole evidence to support summary disposition was the ambiguous plea and the ambiguous plea statment and the

debatable inferences the CFTC chose to draw from these facts. Nothing dispositively and unequivocally established any act prohibited by the Act or that any such act occurred after the effective date of the Act or that the act could have been an accommodation trade or its "tantamount". Under these circumstances, the CFTC could not properly grant summary disposition and deny Mr. Sundheimer his statutory hearing, because

> "the moving party [must] show, on the basis of admissible evidence * * * that 'there is no genuine issue as to any material fact' [citations omitted]. Where this initial showing is not made, summary judgment will be denied, even though the party opposing the motion has submitted no probative evidence to support its position or to establish that there is a genuine issue for trial', Pent-R-Books, supra, 538 F.2d at 529,

and

> "[f]acts not conclusively demonstrated, but essential to the movant's claim, are not established merely by his opponent's silence", Campbell, supra, 593 F.2d at 1027,

and the CTFC's

> "surmise, however, plausible on its face, cannot substitute for full-bodied proof." Campbell, supra, 593 F.2d at 1028.

The prohibition against summary disposition on slight ambiguous evidence is especially strong in a case such as the present one where the meaning or effect or words or acts are in dispute, J. B. Williams, supra, 408 F.2d at 431, or where an inquiry into the facts may be desired to clarify applicable law. Wessinger, supra, 438 F.Supp. at 1256; Smith Bowman, supra, 190 F.Supp. at 588-9.

There being substantial disputed facts as to the meaning of the plea and plea statement and the inferences to be drawn therefrom and there being no evidence whatsoever as to the meaning of "accommodation trade" or the facts and reasoning underlying the Tantamount Holding, summary disposition was clearly improperly granted.

II

THE CFTC EXCEEDED ITS STATUTORY JURISDICTION AND AUTHORITY BY IMPOSING SANCTIONS GROUNDED IN THE TANTAMOUNT HOLDING

The CFTC is authorized to impose the §4c(a) sanctions only upon a proper finding of a violation of the Act. §6(b). Here the CFTC did not find a violation of the Act, but only something "tantamount to" a violation.* Tantamount does not mean "the same as" or "identical with". Some event or thing which is "tantamount to" a term used in a statute does not make the statute applicable to that event or thing. Trotz v. Commissioner, 361 F.2d 927, 929 (10th Cir. 1966).

In reaching the Tantamount Holding the CFTC announced its intention to impose its severest sanctions in the strictest form against those who act in any manner of which the CFTC does not approve, whether or not Congress so authorized. When com-

* The requirement of §10(e) (2) (C) of the Administrative Procedure Act [5 U.S.C.A. §706(2)(C)] that this Court "shall *** set aside agency action *** found to be *** in excess of statutory jurisdiction, authority, or limitations ***" is applicable to CFTC action. Wiscope S.A. v. CFTC, 604 F.2d 764 (2d Cir. 1979); British Am. Commodity Options Corp. v. Bagley, 552 F.2d 482, 490 n.12 (2d Cir. 1977), cert. denied, 434 U.S. 938 (1977).

itted, Mr. Sundheimer's acts violated only one law, the federal criminal law, and under that system Mr. Sundheimer has already paid his full penalty.

The impact of the Tantamount Holding upon Mr. Sundheimer is substantial. He is denied his liberty to enter into contracts. He must pay a substantial fine. His registration as a floor broker is revoked. He is expelled from the business in which he has made a living for 20 years.

The impact upon others engaged in the same business is equally offensive. The industry is now subject to the whim of the CFTC. The CFTC may one week approve, the next week condone and the following week condemn and impose sanctions for any act which it may loosely characterize as "tantamount to" something which is prohibited by the Act. Regulatory predictability and the ability to plan one's affairs within the context of specific rules are abolished.

The impact upon the United States Constitution system is even more venal. How can a court review any disciplinary or exclusionary act of any agency if the Tantamount Holding is sustained?

As is set forth more fully immediately hereinafter, (a) Mr. Sundheimer's acts do not constitute accommodation trades or anything remotely similar to them, and (b) the CFTC may not expand its jurisdiction to include the imposition of sanctions for things "tantamount to" specific violations of the Act.

A. Mr. Sundheimer's Acts Do Not Constitute "Accommodation Trading."

Section 4c(a) was originally enacted in haec verba in 1936, Ch. 545 of the laws of 1936, §5, 49 Stat. 1494, but did not become applicable to crude oil futures until April 21, 1975. Section 4c(a) prohibits any transaction which "is, is of the character of [*], or is commonly known to the trade as, a * * * 'accommodation trade'", without further definition of the phrase "accommodation trade".

At the time the section was originally enacted, Senator Pope, spokesman for the bill, twice advised the Senate that

> "[a]n accommodation trade is a transaction between two commission houses whereby, one being long with the clearing house and the other being short, the one that is long sells to the one that is short enough of a given future[s] to give each house an even or nearly even position, thus reducing the amount of [the] margin to be put up with the clearing house." 80 Cong. Rec. 6162 and 8088 (1936). (See Addendum to Memorandum on Behalf of Petitioner herein, the "Addendum," submitted herewith, at pp.16-18.)

There are no other definitions in the section's legislative history. Clearly the acts charged against Mr. Sundheimer do not fit within this definition. Under usual standards of statutory construction, the definition before Congress at the time of enactment, a fictitious trade to circumvent margin requirements, is the only acceptable definition. Cf. Litchfield Sec. Corp. v United States, 325 F.2d 667-73 (2d Cir. 1963).

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*The language, "of the character of" is intended to proscribe the specified act whether or not the term used to describe it subsequently changes. See CFTC v. Morgan, Harris & Scott, Ltd., 484 F Supp 669, 676 (S.D N.Y. 1979); cf. Precious Metals Assoc v. CFTC, 620 F.2d 900, 906 8 (1st Cir. 1980).

Substantially subsequent to enactment of this section, in two isolated decisions the Department of Agriculture used the term "accommodation trade" to mean a "wash" (meaning fictitious, in that there is no "actual change of ownership") trade to enable the opposite broker to offset his own customer's sales and purchases without detection, Irwin M. Eisen, 22 Agric. Dec. 758, 760 (1963), Julian M. Marks, 22 Agric. Dec. 761, 772 (1963). Since the CFTC has properly held that the transactions involved in this proceeding were not fictitious (JA. 16, n.9), this definition does not apply to Mr. Sundheimer.

In 1966, the CFTC's predecessor, the Commodity Exchange Authority, informally attempted to broaden the definition of "accommodation trading" to mean:

> "'wash trading entered into by one broker to assist another broker to make cross trades, wash trades * * *.'"* CFTC v. Savage, 611 F.2d 270, 284 n.13 (9th Cir. 1979).

A wash trade is a fictitious trade. Savage, supra, 611 F.2d at 284 n.13. Hence, under the 1966 definition, an accomodation trade must be a fictitious trade. Accordingly, by definition, the subject transaction cannot be an "accommodation trade" within the meaning of the 1966 definition.

Under this 1966 definition, to be an accommodation trade, the transaction must also be in aid of a cross trade or a wash trade. A "cross trade" is (a) an indirect bucketing**

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* The omitted phrase is merely "etc.". (See Addendum at p.33.)

** "Bucketing" is "[d]irectly or indirectly taking the opposite side of a customer's order * * *." S. Rep. No. 93-1131, 93d Cong., 2d Sess. Appendix IX, reprinted in [1974] U.S. Code Cong. & Ad. News 5891. (Addendum at p.20.)

transaction, (b) an offset of one customer's order against another's, or (c) a specific type of wash trade (fictitious trade). Id.

The CFTC properly held that the transactions which are the subject of the present proceeding were not fictitious, because positions were actually taken in the market in connection with these transactions (JA.16 n.9), and no claim was made of bucketing.

Accordingly, for the additional reason that neither fictitious nor cross trades were aided by Mr. Sundheimer's acts, Mr. Sundheimer's acts by any authoritative definition do not constitute accommodation trades within the meaning of the 1966 definition.

In connection with the 1974 enactment of the Act, the Senate Committee prepared a "Glossary of Terms Used in Commodity Futures Trading." S. Rep. No. 93-1131, 93d Cong., 2d Sess. Appendix IX, reprinted in [1974] U.S. Code Cong. & Ad. News 5891. The glossary defines "wash trading" ("accommodation trade's" companion in §4c(a)) consistently with the foregoing, but the lexicographers dared not attempt to define "accommodation trade".

In 1979 the CFTC submitted a glossary to the Senate Committee on Agriculture, Nutrition and Forestry under a caveat that

> "[i]t is not, under any circumstances, to be deemed a set of legal definitions, nor a guide to interpretation of the Commodity Exchange Act." 95th Cong. 2d Sess., Committee Print, Futures Trading Act of 1978, January 1979, p.141 et seq. (Addendum at pp.24-32.)

That glossary defined "accommodation trade" as

> "[w]ash trading entered into by a trader, usually to assist another with illegal trades", id.

and "Wash Trading" as

> "[e]ntering into, or purporting to enter into transactions to give the appearance that purchases and sales are being or have been made, usually not resulting in a change in the trader's market position", id. at 164,

again repeating the requirement that an "accommodation trade" be fictitious, which the CFTC has properly held is not the present case. Interestingly, the glossary identifies "cross trade" and "wash sales" (companions of "accommodation trade" and "fictitious sales" in §4c(a)) as acts prohibited by the Act, but does not so identify "accommodation trade" or "fictitious sale", which latter term has been held to be unconstitutionally vague (see infra, Point II).

There being no other authoritative definitions of "accommodation trade", and it being clear both logically and from the CFTC's own determination to use the word "tantamount" that the acts charged against Mr. Sundheimer do not constitute accommodation trades, it follows that Mr. Sundheimer did not violate the Act.

B. The CFTC May Not Impose Sanctions for Behavior Which is Not Prohibited by the Act

In the Tantamount Holding the CFTC purports to extend its authority to impose sanctions against persons who engage in conduct which the CFTC considers to be "tantamount to" an act prohibited by the Act. In so doing, the CFTC has clearly exceeded its statutory mandate

Despite the deference to be afforded the CFTC in respect of its interpretation of the Act which empowers it,* the CFTC "may not bootstrap itself [as here attempted] into an area in which it has no jurisdiction by * * * violating its statutory mandate." Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973). See also SEC v. Sloan, 436 U.S. 103 (1978).

In the Tantamount Holding the CFTC overstepped the

> "limits, grounded in the language, purpose, and history of the particular statute, on how far an agency properly may go in its interpretative role." International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 (1979).

The language of §4c(a) prohibits accommodation trades**-- trades currently held to be fictitious trades entered into to enable others to enter into fictitious trades or to bucket or offset customer's orders, and earlier at the time of enactment held to be those entered into to avoid margin requirements. It does not prohibit any act alleged against Mr. Sundheimer.

The Tantamount Holding, if sustained, would make §4c(a)

> "a solution to virtually any other problem which might occur in the marketplace." Sloan, supra, 436 U.S. at 117.

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* There are limits to such deference. See, e.g., Judge Feinberg's analysis in In re Chin Thloot Har Wong, 224 F.Supp. 155, 164-165 (S.D.N.Y. 1963).

** Even the most cursory review of the Act discloses that the prohibition against "accommodation trades" was directed against a specific practice. Contrast the broad general language used by the Congress in prohibiting fraud (Act, §4b(A) [7 U.S.C.A. §6b(A)]) and market price manipulation (Act, §6(b) [7 U.S.C.A. §9]) in accordance with the Congressional purpose. See Act, §3 [7 U.S.C.A. §5] Where, as here, the acts complained of do not fall within the broadly defined categories of fraud or manipulation, the CFTC cannot be permitted simply to redefine the specific prohibitions and expand its jurisdiction to suit its supposed needs.

As the Supreme Court stated in Sloan, supra, rejecting a similar attempt by the Securities and Exchange Commission to broaden its remedial powers beyond that "clearly contemplated by" its enabling statute,

> "[w]e do not think [the section] * * * was meant to be such a cure-all." Id.

Moreover,

> "had Congress intended the Commission to have the power * * * we expect that it could and would have authorized it more clearly * * *." 436 U.S. at 122.

The CFTC's present effort "to enlarge * * * the application of a statute should be subjected to close scrutiny", Celebrezze v. Kilborn, 322 F.2d 166, 168 (5th Cir. 1963), and the Order must be set aside "if the agency's underlying standards are not in accord with law", Wheatley v. Adler, 407 F.2d 307, 310 (D.C. Cir. 1968), because "[a]n administrative decision based upon erroneous standards cannot stand." Kovac v. Immigration and Naturalization Serv., 407 F.2d 102, 104 (9th Cir. 1969).

Since the Tantamount Holding "cannot be derived from the statutory language or from prior [Commission] * * * precedent", it is clear that the CFTC has acted "outside the law", IBEW v. NLRB, 487 F.2d 1143, 1171 (D.C. Cir., en banc, 1973), cert. denied, 418 U.S. 902 (1974), and this court's obligation to defer to the CFTC's interpretation of the Act "is limited by this court's obligation 'to honor the clear meaning of the statute, as revealed by its language, purpose, and history', [citing Daniel, supra, 439 U.S. at 566, n.20] and by the requirement that the agency interpretation not be clearly wrong or unreasonable." Coca-Cola Co. v. Atchison, T. & S.F. Ry. Co., 608 F.2d 213, 222 (5th Cir. 1979).

As stated by the Supreme Court in SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

> "an order may not stand if the agency has misconceived the law."

Here the CFTC has interpreted the Act as outlawing or applying to behavior which the Act does not proscribe. Accordingly, the order is overbroad and reflects an undue enlargement of the CFTC's authority beyond that granted by Congress.

Since Mr. Sundheimer's acts do not constitute accommodation trades or any other behavior prohibited under the Act, and since the Order is therefore beyond the authority of the CFTC, the Order should be vacated on that ground alone to the extent that it imposes §4c(a) Sanctions upon Mr. Sundheimer.

III

AS APPLIED TO MR. SUNDHEIMER, THE PROHIBITION OF "ACCOMMODATION TRADES" IS UNCONSTITUTIONALLY VAGUE

If "accommodation trade" as used in §4c(a) has any meaning, it should be the meaning ascribed to it at the time of enactment of §4c(a) (see supra, Point I(C)(i)). Here, the Commission has attempted to ascribe to it a meaning which it has never had at any prior time -- trades in which actual positions were taken by both sides to the transaction.

The fluidity of the definitions ascribed to the term "accommodation trade" over the years, as described in Point II(A) supra, patently suggests that the term is unduly vague. The fact that the Senate Committee considering the 1974 enactment of the Act recoiled from attempting a definition of the term strongly suggests that it is a meaningless term

The "void-for-vagueness" doctrine applies to any government agency attempt to prescribe or proscribe individual conduct. See, e.g., Ashton v. Kentucky, 384 U.S. 195, 200 (1966). ("Vague laws in any area suffer a constitutional infirmity.") See also Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d 373 (7th Cir. 1981); Paccar, Inc. v. Nat'l Highway Traffic Safety Administration, 573 F.2d 632 (9th Cir.), cert. denied, 439 U.S. 862 (1978); Boutilier v. Immigration & Naturalization Serv., 363 F.2d 488 (2d Cir. 1966), aff'd, 387 U.S. 118 (1967).

Under the void-for-vagueness rule, vague or fluid terms, such as "accommodation trade", may not be used to identify the act which is prohibited. Grayned v. City of Rockford, 408 U.S. 104 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); United States v. La Mantia, [1977-80 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,667 (N.D. Ill. 1978).

In Grayned, supra, the Supreme Court definitively stated the policy considerations supporting the due process prohibition against vague regulatory statutes as follows:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic

> policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Footnotes omitted.] 408 U.S. at 108-109.

Earlier, in language particularly appropriate to the present case, the Supreme Court struck down a constitutionally vague statute stating the reasoning governing the present appeal, "'Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula.'" Cramp, supra, 368 U.S. at 287, quoting from United States v. Cardiff, 344 U.S. 174, 176 (1952).

Here, it is the fluid and expanding meaning which the CFTC attempts to ascribe to the term "accommodation trade" which offends against the constitutional principles as much as the fact that the term is almost impossible of definition.

Indeed, "fictitious sale", a companion in §4c(a) to "accommodation trade", was held constitutionally vague by the court in La Mantia, supra, because, like the term "accommodation trade" as applied by the CFTC in the present case, it was not defined in the Act, there was no judicial construction of the term, the term did not appear in treatises on commodities and the definition sought by the government was not supported by the legislative history of the Act.

Nowhere in the present record has the CFTC purported to substantiate its application of the term "accommodation trade" to the subject transaction; and nowhere in the prior history of the Act or its predecessor statutes does there appear any indication that the subject transaction was intended to be proscribed by the Act's prohibition of "accommodation trades".

If, as the CFTC apparently asserts, the term "accommodation trade" has no fixed meaning but may be defined and redefined to supply authority for sanctions whenever the CFTC feels impeded by the limitations of its proper statutory mandate, then the term is clearly too vague to give reasonable prior notice of the conduct sought to be prohibited.

Thus, whether on the ground that the application advanced by the CFTC in the present case exceeds the scope of all prior authoritative definitions of the term, or on the alternative ground that the various definitions applied to the term establish its fluidity and imprecision, the imposition of severe sanctions against Mr. Sundheimer upon the basis of his participation in an act characterized as "tantamount to" an "accommodation trade" violates his constitutional right to due process.

IV

THE CFTC WRONGFULLY DENIED MR. SUNDHEIMER A MEANINGFUL HEARING ON MITIGATION AND REHABILITATION

Section 8a of the Act empowers the CFTC to revoke the registration of a floor broker "after opportunity for hearing" upon a finding of unfitness by reason of conviction of a felony. Substantial CFTC authority establishes that the prescribed hearing must relate to the question of mitigation and rehabilitation. 40 F.R. 28126 (1975); In re Rafferty CFTC Docket No. 79-15 (1981) (Addendum at 6); In re La Mantia, 2 Comm. Fut. L. Rep. (CCH) ¶21,048 (1980); Lambert Joseph Hagan, [1975-1977 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶20,171 (1976); Eugene E. Shaefer, Jr., [1975-1977 Transfer Binder] Comm. Fut. L. Rep.

(CCH) ¶20,191 (1976); Division of Enforcement v. Rodin, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,114 (1976).

By imposing the Seven Year Rule, without any prior notice to Mr. Sundheimer and by requiring proof of rehabilitation beyond "any doubt", not "reasonable doubt", the CFTC deprived the three day hearing on rehabilitation and mitigation of any meaning and turned it into a sham and mockery and denied Mr. Sundheimer the notice to which he was entitled. (See Point I(A), supra.)

The record is substantial in support of mitigation. The federal prosecutor stated that Mr. Sundheimer was "not intimately involved in the operation of the scheme on a day-to-day basis." (JA.89) He did not initiate the subject transaction, was never involved in it, was not a member of the unregulated market where it occurred; he merely acquiesced and, not being an owner of Pressner, he did not benefit. His reputation then and thereafter was of competence and the highest integrity.

The evidence of his rehabilitation was also substantial. He spent substantial time cooperating before charges were pending or imminent (JA.227-8, 230-1, 233), pleaded guilty, won the support of the prosecutors, and won the support of the prosecuting agency for which he performed his community service. He paid fines and accepted suspensions from commodities exchanges. Except during periods of suspension, he continued as a trader and broker with no hint of wrongdoing. He retained the respect of friends and business acquaintances. The CFTC, with full knowledge of the facts, renewed his registration annually through 1981.

One of the prosecutors, two of his supervisors at the prosecuting agency where he performed his community service, three close personal friends and ten prominent members of the commodity futures industry testified on Mr. Sundheimer's behalf in support of mitigation and rehabilitation. In particular, the testimony of the industry leaders was compelling.

Five, Rubin, Corby, Geraghty, Landry and Sanborn, were associated persons (the commodity industry's equivalent of customers' representatives) of substantial rank who were in need of the services of a floor broker who would efficiently and honestly execute their customer's orders. Mr. Sanborn, an E.F. Hutton vice-president (JA.321), described Mr. Sundheimer as

> "[o]ne of the more professional floor brokers * * * I would refer a good percentage of my business to him because of that reason * * * he is very honest, someone that I would trust * * * that I would put my faith in * * * one of the most competent * * * very highly regarded * * *." (JA.323).

Mr. Landry, a Dean Witter Reynolds vice-president (JA.403), testified of Mr. Sundheimer

> "that it would be very detrimental to our [Commodity Guided Account] program if we were not allowed to use him in the future [JA.405] * * * my ability to perform for my clients * * * is measured by my ability to choose the right broker * * * Steve has done an absolutely outstanding job * * *," (JA.409)

and that he would "absolutely not" use a broker he felt was dishonest. (JA.409).

Mr. Geraghty, a metal trader at Dean Witter Reynolds (JA.298), testified of Mr. Sundheimer that Mr. Geraghty's substantial European clients "prefer to use him [Mr. Sundheimer]"

(JA.302) and

> "I've always found him to be honest * * * I wouldn't give the brokerage to anyone that I thought might step ahead of me in a trade or do anything that would affect my customers, or else I wouldn't have the customers." (JA.302)

Mr. Corby, a Merrill Lynch Pierce Fenner & Smith vice-president (JA.190), testified of Mr. Sundheimer

> "the executions that I got for [from] him were fair and good for my customers * * * his reputation as a floor broker is good * * * his honesty and integrity are fine * * *." (JA.194)

Mr. Rubin, a Thompson & McKinnon vice-president (JA.177), testified that his company used Mr. Sundheimer because

> "the execution service that they gave on the exchange was excellent (JA.181) * * * I've never known him to do anything in terms of executing an order that was dishonest, and that he did not every [sic] try and execute an order to the best of his possible ability." (JA.182)

Two substantial customers, Mierfeld and Albertson, who used Mr. Sundheimer's services directly for their own accounts and therefore had a substantial interest in the integrity of the commodities market, testified in support of Mr. Sundheimer. Mr. Mierfeld, vice-president of Ray E. Friedman & Co., one of the largest firms in the industry (JA.281-2), testified that although he is licensed to trade on the floor of exchanges

> "I like to leave that to people who are experts at it as is Mr. Sundheimer" (JA.284),

and that Mr. Sundheimer had a "very good reputation" for honesty and integrity (JA.284).

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Two substantial customers, Mierfeld and Albertson, who used Mr. Sundheimer's services directly for their own accounts and therefore had a substantial interest in the integrity of the commodities market, testified in support of Mr. Sundheimer. Mr. Mierfeld, vice-president of Ray E. Friedman & Co., one of the largest firms in the industry (JA.281-2), testified that although he is licensed to trade on the floor of exchanges

> "I like to leave that to people who are experts at it as is Mr. Sundheimer" (JA.284),

and that Mr. Sundheimer had a "very good reputation" for honesty and integrity (JA.284).

Mr. Albertson testified that he is a Florida processor of citrus products (JA.385) and that he employs Mr. Sundheimer's services as a broker because

> "I consider him able, knowledgeable, and very efficient in terms of his ability to execute in the ring (JA.389) * * * it very often involves discretion and judgment * * * I probably had the most successful experience, in terms of the service that I've obtained from any floor broker, in the relationship I have with Steve," (JA.390).

and that Mr. Sundheimer's honesty and integrity is "one of the highest magnitude in all of our dealings." (JA.390).

Three executive members of commodities futures exchanges, Stern, Herman and Mintz, testified on behalf of Mr. Sundheimer. Mr. Mintz, the Chairman of the Board of the Commodity Exchange, Inc. (JA.509), testified that he is a member of the New York Mercantile Exchange and has had business dealings with Mr. Sundheimer on that exchange (JA.509). He testified of Mr. Sundheimer

> "I've been satisfied greatly with the executions, the honesty of the executions, and the service * * * he's perfectly open, honest, and a very fine member of the Exchange." (JA.510)

Indeed Mr. Mintz testified of Mr. Sundheimer

> "I would recommend him for membership in Comex [Commodity Exchange, Inc.] * * * I would sponsor him, even though I'm Chairman of the Board." (JA.511)

Mr. Stern, a member of the Board of Governors of the New York Mercantile Exchange for 27 years and its Chairman Emeritus (JA.210), testified that he had appointed Mr.

Sundheimer to that exchange's Clearinghouse Committee and

> "he conducted himself with great distinction. His decisions, his recommendations were always in the public interest and for the good and general welfare of the Exchange." (JA.211)

He testified that he has placed orders with Mr. Sundheimer (JA.216-7) and that

> "his reputation [for honesty and integrity] is impeccable * * * incidentally, he happens to be a very capable broker as well (JA.213) * * * he's a credit to the commodity futures industry and to those people that he deals with." (JA.218)

Mr. Herman, a commodity trader and floor broker, who was a member of several commodities futures exchange boards and committees (JA.266-7), testified that he had done business with Mr. Sundheimer for many years. He testified that

> "[h]e has a very fine reputation as a floor broker, as an honest, competent broker * * * he's an extremely honest, reliable, competent broker and a good human being * * * many times * * * the major commission houses, when they had a difficult order to execute, direct it specifically for Mr. Sundheimer to handle * * * this is quite an accolade to have your colleagues entrust you with their personal business." (JA.269-270)

Under these circumstances, it was improper for the CFTC, without notice, to adopt the Seven Year Rule without stating any rational basis for it, and therefore deprive Mr. Sundheimer of the meaningful hearing to which due process entitled him. FCC v. National Citizens Comm'n for Broadcasting, 436 U.S. 775 (1978); Goldberg v. Kelly, 397 U.S. 254 (1970); Armstrong v. Manzo, 380 U.S. 545 (1965); Local 777 v. NLRB, 603 F.2d 862 (D.C. Cir. 1979), as amended (1979); Florida v.

Mathews, 526 F.2d 319, 324 (5th Cir. 1976); Ashland Oil & Refining Co. v. FPC, 421 F.2d 17, 23 (6th Cir. 1970). Here, there is no rational basis for adopting and applying a rule that, as a matter of law, a person may not be rehabilitated seven years after aiding another's tax fraud by acquiescence. On that theory, we would never dare release a felon from supervision in less than seven years.

In Goldberg and Armstrong, supra, the Supreme Court held that the hearing required of an agency must be a "meaningful" one, 397 U.S. at 267; 380 U.S. at 552.

In National Citizens, supra, the Supreme Court held that any agency's rules may be invalidated by a reviewing court

> "if they are not rational and based on consideration of the relevent factors." 436 U.S. at 803.

In Local 777, supra, the court was confronted with a fact pattern where the NLRB, as has the CFTC here, had made substantially inconsistent decisions about the distinction between employment and independent contracting. The court held that an agency must conform to its own precedents or explain its departure, citing International Union v. NLRB, 459 F.2d 1329 (D.C Cir. 1972), and stated the rule governing the present proceeding as follows:

> "Although an agency may change its policy as it determines is in the public interest, [citation omitted] when, as here, it announces no principled reason for such a reversal, its action is arbitrary and the courts should be quick to so declare." 603 F.2d at 882.

There is no rational basis for the CFTC's harsh conclusion that an individual may not be rehabilitated in seven years. The CFTC did not even attempt to state a rational basis and, in view of other CFTC rulings, it cannot. In Rafferty, supra, the respondent had pleaded guilty in September, 1977 to two felony counts of conspiracy to commit securities and mail fraud and filing false income tax returns. He was found to be rehabilitated by decision dated July 15, 1981, despite his psychiatrist's testimony that

> "I don't think anybody can certify anybody's behavior that they're not going to do anything."

In In re Nordlicht, 2 Comm. Fut. L. Rep. (CCH) ¶21,027 (1980), the CFTC's decision tacitly held that Mr. Nordlicht, who actually negotiated the wrongful transaction which is the subject of this proceeding, while Sundheimer merely acquiesced, would be deemed rehabilitated by February of 1982. Accordingly, the CFTC's action was arbitrary and Sundheimer's registration as a floor broker should also be restored.

V

THE CFTC WAS ARBITRARY AND CAPRICIOUS IN THE MANNER IN WHICH IT IMPOSED SANCTIONS

The permanent revocation of Mr. Sundheimer's broker registration and the $100,000 penalty are the maximum permitted by the Act. The two-year prohibition of trading is substantial.

The CFTC's imposition of sanctions is subject to court review. APA, 5 U.S.C.A. §§551, 702, 704; Arthur Lipper Corp. v. SEC, 547 F.2d 171, 183-84 (2d Cir. 1976), cert. denied, 434 U.S.

1009 (1978); Beck v. SEC, 430 F.2d 673 (6th Cir. 1970).

The sanctions imposed by the CFTC constitute a gross abuse of discretion because they were applied discriminatorily, Sartain v. SEC, 601 F.2d 1366 (9th Cir. 1979); see also Hiller v. SEC, 429 F.2d 856 (2d Cir. 1970), and because they do not bear a reasonable relation to the conduct which evoked the sanctions, Kent v. Hardin, 425 F.2d 1346 (5th Cir. 1970), or the goals the Act was designed to accomplish, Barnum v. National Transportation Safety Bd., 595 F.2d 869, 872 (D.C. Cir. 1979).

Moreover, the CFTC has not adequately stated its grounds for imposing its most severe sanctions.

A. The Sanctions Were Discriminatorily Imposed upon Mr. Sundheimer.

The sanctions imposed upon Mr. Sundheimer are substantially greater than those imposed upon Mr. Nordlicht*, even though Mr. Nordlicht was the active participant in the offense on behalf of Pressner and Mr. Sundheimer was not directly involved, see In re Nordlicht, 2 Comm. Fut. L. Rep. (CCH) ¶21,027 (1980); and despite Judge Broderick's conclusion that Mr. Nordlicht deserved twice the penalty imposed on Mr. Sundheimer. See Arthur Lipper, supra, 547 F.2d at 184, in which one important factor considered by this Court in its determination to reduce the penalties imposed by the SEC was "the tremendous disparity between the sanctions invoked against petitioner and that imposed on the two other brokers whose violations were perhaps more clear."

Curiously, although the determination of liability in

* The prohibition is greater by a magnitude of eight.

Nordlicht, supra, precisely parallels the initial determination of liability in the present case, the further proceedings as to mitigation and rehabilitation of which Mr. Sundheimer availed himself resulted in a far more severe penalty despite the CFTC's conclusion that certain of the violations attributed to Mr. Sundheimer by the ALJ were not sustainable. It is not proper to subject Mr. Sundheimer to punishment greater than that imposed upon Mr. Nordlicht "in retaliation for a petitioner's assertion of his federal rights." Sartain, supra, 601 F.2d at 1375.

Indeed, despite the longstanding principle that the sanctions imposed under the Act against different violators for similar violations should be reasonably uniform [see, e.g., In re Romoff, 31 Agric. Dec. 158, 177 (1972)], the penalty to which the CFTC has subjected Mr. Sundheimer appears draconian in comparison to the sanctions heretofore imposed for purported transgressions of similar nature. Contrast, e.g., the 15 day suspension of registration imposed upon respondents Lamborn and Blankenship for virtually identical conduct in In re Richardson Securities, Inc., ("Richardson I"), [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,842 (1979); the 15 day suspension of registration and $5,000 fine imposed on respondent Levine for virtually identical conduct (see Richardson, supra, ¶20,842 at pp. 23,458-459) in In re Richardson Securities, Inc. [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,810 (1979), and the $100,000 fine and holding "in abeyance" of all other sanctions imposed upon respondent Siegel Trading Co., Inc. for prearranged tax straddles, bukeeting and wash sales, in In re Siegel Trading Co., Inc., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,452 (1977

B. The Sanctions Do Not Bear a Reasonable Relation to the Purposes of the Act.

The primary purpose of the Act is the protection of the price discovery mechanism. Act, §3 [7 U.S.C.A. §5]. Accordingly, market manipulation is considered to be the most serious violation of the Act. Hugh P. King, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,211 at p. 21,153 (1976).* Mr. Sundheimer, however, was not found to have engaged in market manipulation, nor to have participated in activities operating as a fraud on any cusotmer or market participant. Contrast the 18 month suspension imposed for extensive unauthorized trading in a customer's account in In re Haltmier, [1975-1977 Transfer Binder] Comm Fut. L. Rep. (CCH) ¶20,160 (1976). See, also, In re Clancy, 2 Comm. Fut. L. Rep. (CCH) ¶21,126 (1980). Clearly, the imposition in the present case of the most severe sanctions for an offense which the CFTC could not find to be clearly proscribed by the Act does not further the goals of the Act. See, also, Richardson I and Siegel Trading, supra, in which the extended discussions by the ALJ's belie the CFTC's characterization of the tax straddle transactions at issue as among the most serious violations of the Act.

* The King case provides further illustration of the gross disparities in sanctions meted out by the CFTC. There, in a decision apparently intended to convey the CFTC's deep concern over charges of market manipulation, the Commission nevertheless settled the charges against the respondent upon his acceptance of a 45 day trading and registration suspension, together with a cease and desist order. The facile explanation (i.e., administrative convenience) for this extremely lenient treatment of a person charged with "unlawful activities of the most serious type proscribed by the act," id., merely underscores the fact that the CFTC exercises its drastic powers in a most arbitrary and capricious fashion, subject to favoritism, bias, and whim. See, also, In re Hunt, [1977-1980 Transfer Binder] Comm Fut. L. Rep (CCH) ¶20,805 (1979); In re Carr, [1977-1980 Transfer Binder] Comm Fut L Rep. (CCH) ¶20,454 (1977).

Moreover, the decision to impose lesser sanctions on Mr. Nordlicht is authority that lesser sanctions are required to achieve the goals of the Act.

C. The CTFC Sanctions Are Not Supported by Adequate Findings.

The CFTC failed to disclose any grounds for its imposition of harsh sanctions upon Mr. Sundheimer. A federal agency, however, must clearly disclose the grounds of its decision as to sanctions. Appalachian Power Co. v. EPA, 545 F.2d 1351, 1356 (4th Cir. 1976); Steadman v. SEC, 603 F.2d 1126, 1139-40 (5th Cir. 1979), aff'd, ___ U.S. ___, 67 L.Ed.2d 69 (1981); see also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

In Steadman, supra, the court remanded the case to the SEC for further consideration of the sanctions imposed holding as follows:

> "Where, as here, the most potent weapon in the Commission's 'arsenal of flexible enforcement powers,' Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195, 96 S.Ct. 1375, 1382, 47 L.Ed.2d 668 (1976), is used, the Commission has an obligation to explain why a less drastic remedy would not suffice." 603 F.2d at 1139.

Indeed, in affirming Haltmier, supra, this court similarly admonished the CFTC itself, as follows:

> "Nevertheless, though we uphold the full sanction in this case, we remind the Commission that the Act does not compel it to impose across-the-board suspensions automatically whenever any violation is shown, and that it has, and should exercise, discretion in the individual case to determine how much of the full statutory remedy it should invoke. The agency's discretion as to the length of a suspension, extends also to the type and extent of the suspension, as well as to its choice

among the various remedies the statute authorizes. See, generally, Amalgamated Local Union 355 v. N.L.R.B., 481 F.2d 996, 1006-1009 (2d Cir. 1973). It would be well if the Commission revealed in its opinions that it had exercised the discretion it possesses." Haltmier v. CFTC, 554 F.2d 556, 564 (2d Cir. 1977).

Here, ignoring this court's warning, the CFTC again refused to explain how it reached the conclusion that Mr. Sundheimer's passive acquiescence "constitutes a serious violation" under the Act (JA.17) or was "nearly egregious as * * * the gravest offense under the Act" (JA.20-21).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Order should be vacated to the extent it imposes §4c(a) Sanctions. The vacation may be without or with remand since certain grounds for review, lack of evidence of a violation, the CFTC's exceeding of its authority, the vagueness of the statutory provision and laches in giving notice of the charge, indicate that remand is inappropriate. The Order should be vacated and remanded for further hearings to the extent it revokes Mr. Sundheimer's floor broker registration.

Respectfully submitted,

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IV. SUNDHEIMER'S GUILTY PLEA AND HIS PLEA STATEMENT PRECLUDE HIM FROM DENYING THAT HE VIOLATED THE ACT.

"The effect of a plea of guilty that meets constitutional standards is determinative: 'it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.'" United States ex rel. Rosa v. Follette, 395 F.2d 721, 724 (2d Cir. 1968) (citations omitted). There is no contention that Sundheimer's guilty plea is defective. It is, therefore, determinative of the charges in the information.

It is not disputed that under the "general doctrine of estoppel," the "estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." See Emich Motors v. General Motors, 340 U.S. 558, 568-569 (1951) (citation omitted). Where, however, there is a guilty plea, the truth of the averments in the information is admitted, United States v. Rubin, 243 F.2d 900, 902 (7th Cir. 1957). And, furthermore, "[I]n the case of a guilty plea collateral estoppel may apply by examining the record as to the offense charged and the determinations 'essential to a conviction'." Metros v. United States District Court for the Northern District of Colorado, 441 F.2d 313, 319 (10th Cir. 1970) (Per Holloway, J., concurring in the result) (citation omitted).

25/ (Footnote continued)

> feiting, gambling, or similar crimes; or (4) involves the violation of section 1341, 1342, 1343 of Title 18, United States Code. . . ."

40 Fed. Reg. 28125-28126 (June 30, 1975) (emphasis added). Compare, Local 777 v. National Labor Relations Board, 603 F.2d 862, 871-872 (D.C. Cir. 1979).

The Commission concluded that Sundheimer was estopped to deny, as set forth in the information

> "'creating predetermined losses . . . for the fiscal year ending October 31, 1974, and for the fiscal year ending October 31, 1975, and predetermined gains for that company in the following fiscal years.'"

(JA. 14-15; emphasis added by the Commission). As the Commission noted, "creation" of gains in the following years necessarily includes trading after October 31, 1975. (JA. 15). Accordingly, Sundheimer's guilty plea established that the prearranged trading authorized by him was engaged in after April 21, 1975, the date on which the Act became applicable to certain previously unregulated commodities, including crude oil. See supra p. 12; see also JA. 15.

Nevertheless, Sundheimer urges at length (S. Br. 14-19), that his plea is ambiguous as to any particular act charged in the information. In doing so, however, Sundheimer ignores both the text of the criminal information (JA. 65-66) and the plain meaning of his own statements on pleading guilty.

The information charges "[f]rom in and around September, 1974 until on or about July 19, 1976," Sundheimer aided preparation and presentation of false tax returns and "fixed, rigged and fraudulently prearranged trades" of crude oil contracts in furtherance of the tax offense. (JA. 65). Read as a whole, the information plainly charges prearranged trading from September 1974 to July 19, 1976. Moreover, the information's allegations of prearranged futures trading are an integral part of the tax offense charged. The prearranged trading is the method by which Sundheimer aided the filing of false tax returns (see JA. 65-66; see also JA. 15).

This relationship was acknowledged by Sundheimer in his plea statement. When asked by the District Court "just what it is you did," Sundheimer responded that he consented to his company's participation in prearranged trading "that would ultimately enable an oil company to obtain tax benefits . . . ." (JA. 77).

Further, in response to the District Court's question whether Sundheimer's consent in 1974 extended to transactions to enable the oil company to take tax losses for a second year, fiscal 1975, Sundheimer responded: "I think that it was implicit in the initial understanding. There was no additional consent required." (JA. 77). And as discussed above, the guilty plea itself conclusively establishes that the consent went well beyond October 1975.

V. SUNDHEIMER'S ACTIVITY CONSTITUTES ONE OF THE MOST SERIOUS VIOLATIONS OF THE ACT.

A. The Illegal Accommodation Trades.

On pleading guilty, Sundheimer described Pressner's role in the oil company's tax trading scheme as follows (JA. 77, emphasis added):

> "Sometime in the fall of 1974, my associate, Mr. Nordlicht, agreed with Mr. Perlmutter and Mr. Turkish that our firm, Pressner Trading Corporation, would take the other side of certain prearranged commodity futures contracts in crude oil futures that would ultimately enable an oil company to obtain tax benefits that they wouldn't otherwise be entitled to, had we not done that.
>
> I gave my consent to that arrangement and I was present when it was made."

As the Commission's opinion makes clear this tax scheme in the crude oil market was effected by means of illegal, accommodation trading (JA. 16, n.9):

> "[The prearranged trading authorized by Sundheimer furnished] the oil company with a vehicle for utilizing a commodity futures market for extrinsic advantage without exposure to market risk, and to that extent, they were tantamount to 'accommodation trades' . . . prohibited by Section 4c(a)(A) of the Act."

The Commission concluded that Sundheimer participated "in a scheme involving the prearrangement of commodity futures transactions . . . and that this constituted a violation of Section 4c(a)(A) of the Act" (JA. 15-16).

All forms of prearranged trading schemes are recognized as an evil under the Act. In 1948, the Commission's predecessor agency explained that Section 4c(a) does

> "not stop at the prohibition of 'wash sales.' It also prohibits any transaction that is of the character of a wash sale [emphasis in original], is commonly understood to the trade as a wash sale, or is a fictitious sale. The language could hardly be broader and, together with the other prohibitions in this section and other parts of the act, evinces an intention to outlaw insofar as possible all schemes of trading that are artificial and are not the result of arms-length trading [emphasis added] on the basis of supply and demand factors and trading opinion of these factors."

In re Jean Goldwurm, 7 Agric. Dec. 265, 275-276 (1948). Similarly, Rule 1.38, 17 C.F.R. 1.38 has long prohibited most prearrangement of trades:

> "(a) Competitive execution required. . . . All purchases and sales of any commodity for future delivery on or subject to the rules of a contract market shall be executed openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place

provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity. . . ." 26/

B. The Prohibition Against Accommodation Trades Is Constitutional.

While the term accommodation trade is not defined in the Act, the Supreme Court has noted that

> "[t]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548, 578-579 (1973), quoted in Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973). See also Precious Metals Associates Inc. v. Commodity Futures Trading Commission, 620 F.2d 900, 907 (1st Cir. 1980).

Sundheimer, however, contends that this statutory prohibition is unconstitutionally vague (S. Br. 33-36). While "a statute attacked as vague must initially be examined 'on its face', . . . it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of 'valid' or 'invalid' solely on the basis of such an examination." United States v. National Dairy Products Corp., 372 U.S. 29, 32 (1963). In fact, "[t]he strong presumptive validity that attaches to an Act of Congress has led [the Supreme] Court to hold many times that statutes are not automatically invalidated as vague simply because

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26/ Accordingly, Mr. Sundheimer's assertion that (S. Br. 7, n.2), "pre-arrangement is not a per se evil in the case of auction markets," is not accurate. He erroneously relies for his authority on the practice in the securities markets.

difficulty is found in determining whether certain marginal offenses fall within their language." Id. (citations omitted).[27/]

In the area of securities law, the Supreme Court has rejected a literal approach to the definition of the term "security", holding rather that

> "Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto."

United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 849 (1975).[28/]

Several sources of definition are commonly used to determine the meaning of a statutory term. Thus, if the term is one of common understanding, those charged with its violation are held to that comprehension. United States v. Harriss, 347 U.S. 612, 617 (1954); Coplin v. United States, 88 F.2d 652, 657 (9th Cir.), cert. denied 301 U.S. 703 (1937). The second source of definition is prior judicial construction. Wainwright v. Stone, 414 U.S. 21, 22-23 (1973). A third source of definition is the trade usage or professional context to which the statute applies. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925). As set forth below, prior administrative application of the term is consistent with its everyday meaning, that is, to assist another.

27/ The Supreme Court went on to say:

> "Indeed, we have consistently sought an interpretation which supports the constitionality of legislation,"

413 U.S. at 32 (citations omitted).

28/ Analogously, Section 4c(a) of the Act does not define "accommodation trades." Rather, it prohibits any transaction which "is, is of the character of, or is commonly known to the trade as . . . [an] 'accommodation trade'." The Act takes a similar approach concerning transactions which are "of the character of" options. See Section 2(a)(1) of the Act; British American Commodity Options Corp. v. Bagley, 552 F.2d 482, 486 (2d Cir.), cert. denied 434 U.S. 938 (1977).

In In re Julian M. Marks, et al., 20 Agric. Dec. 457, 458, 459 (1961), Stuart A. Newman, one of five respondents, was charged with, inter alia, "entering into accommodation trades [and] executing transactions noncompetitively. . . ." "[A]s a result of direct and noncompetitive negotiations with . . . Mr. Marks," Mr. Newman purchased wheat futures for his own account from Mr. Marks, and simultaneously sold the same amount of wheat futures to Mr. Marks for a different total price.

> "In each of these transactions, Newman was 'accommodating' Marks, that is helping Marks to execute his orders."

Id. at 460 (emphasis supplied). 29/

In a related case involving another of the five respondents, In re Julian M. Marks, et al., 22 Agric. Dec. 761 (1963), Irwin M. Eisen was charged with "making noncompetitive trades in wheat for future delivery. . . ." Mr. Marks sold May wheat to Eisen for a customer and bought May wheat from Eisen for his own account, "thus putting Marks on the other side of his customer's order by an accommodation trade by Eisen." Id. at 766.

> "This was an accommodation trade by Eisen and Marks, and a cross trade by Marks, in violation of section 4c(a) of the act, and a noncompetitive trade by both respondents, in violation of section 1.38 of the regulations. Eisen must have known that this would enable Marks either to take the other side of a customer's trade or to cross customers' trades, either of which would be a violation by Marks, in which he was assisted by Eisen." Id. at 772. 30/

29/ Some of Newman's accommodations were gratis, while he was compensated for others. "This in no wise affects the character of the transaction." Id. at 460.

30/ See also Id. at pp. 766, 773 concerning an accommodation trade between respondents Eisen and Smith; and Id. at pp. 768, 776 concerning accommodation trades between respondent Marks and Newman.

In a third case In re Irwin M. Eisen, 22 Agric. Dec. 758, 759 (1963), Mr. Eisen was charged with "entering into a transaction which is, or is of a character of, a 'wash sale' and an 'accommodation trade,' . . . ." Since the 'wash sale' entered into "had the effect of enabling the opposite broker's buying customer to buy from his selling customer, it is of the character of an accommodation trade . . . ." Id. at 760.[31/]

In light of the history of agency explication, which is consistent with the common usage of the term, it cannot be said that the statutory term is vague. Particularly as applied to market professionals, this statutory prohibition gives more than adequate warning. See Precious Metals Associates, Inc. v. Commodity Futures Trading Commission, supra, 620 F.2d at 907-908.

Much like the test for manipulation, the test of prohibited transactions, and in this case "accommodation trades", "must largely be a practical one if the purposes of the Commodity Exchange Act are to be accomplished." See Cargill, Inc. v. Hardin, supra, 452 F.2d at 1163. The methods and techniques of prearranged trading like those for manipulation are "limited only by the ingenuity of man." Id. The issue is whether conduct has been intentionally engaged in that has resulted in trades being accomplished outside the competitive scheme of the commodity futures market for the purpose of enabling or assisting

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31/ For another example of prohibited accommodation trades see In re Laiken, 23 Agric. Dec. 1193 (1964), affirmed, Laiken v. Department of Agriculture, 345 F.2d 784 (2d Cir. 1965).

another in an illegal trade. See Commodity Futures Trading Commission v. Savage, 611 F.2d 270, 283-284 (9th Cir. 1979).[32/]

VI. THE COMMISSION PROPERLY EXERCISED ITS STATUTORY DISCRETION IN IMPOSING SANCTIONS AGAINST SUNDHEIMER FOR VIOLATION OF THE ACT.

"It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" American Power & Light Co. v. Security and Exchange Commission, 329 U.S. 90, 112 (1946), quoting Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194 (1941). Accord Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F.2d 461, 468 (2d Cir.), cert. denied, 361 U.S. 896 (1959). Thus, the Commission's choice of sanction should not be overturned unless the Court of Appeals finds it "unwarranted in law or . . . without justification in fact . . . ." American Power & Light Co. supra, 329 U.S. at 112-113; Butz v. Glover Livestock Commission Co., Inc., 411 U.S. 182, 185-186 (1973); see also Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 563.

If, upon evidence received, the Commission finds any person violating or having violated the Act, Section 6(b) of the Act, 7 U.S.C. §9, provides that the Commission

> "may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading

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32/ Sundheimer challenges the Commission's phrasing (JA. 16) of its statement that the trades authorized by Sundheimer were "tantamount to" accommodation trades. (S. Br. 25-26). The statute, however, prohibits transactions "of the character of" accommodation trades. The Commission's obvious semantic variation on the statutory phrase can hardly be said to be an attempt, as urged by Sundheimer, to expand the statute.

privileges thereon for such period as may be specified in the order, . . .

"and may assess such person a civil penalty of not more than $100,000 for each such violation."

Section 6(c) authorizes issuance of cease and desist orders. Here, the Commission required Sundheimer to cease and desist the violative activity found, suspended his trading privileges for two years and assessed a $100,000 money penalty for the violations.

Accordingly, the sanctions imposed for the unlawful prearranged trading are not "unwarranted in law," American Power & Light, supra, 329 U.S. at 112. Nor are the sanctions unwarranted in fact, id.

The two-year trading suspension was imposed on Sundheimer to protect the markets and as an exemplary penalty, supra, p. 10. The maximum $100,000 penalty was premised on the Commission's view that Sundheimer's conduct was particularly egregious in that the unlawful trading was deliberately entered into, on the gravity of the violations, on the fact that they continued for at least two years, and on the fact that they were entered into for financial gain, supra, p. 10. Similarly, the cease and desist order is plainly appropriate in this case. Cf. Butz v. Glover Livestock Commission, supra, 411 U.S. at 183, 187.

Sundheimer's assertion (S. Br. 47) that the Commission "failed to disclose any grounds for its imposition of harsh sanctions" is simply without merit. Indeed, the articulation by the Commission is fully consistent with this Court's suggestion in Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 564.

Sundheimer contends that the penalty here is invalid as being more severe than penalties imposed upon others (S. Br. 44-45). The Court of Appeals for the Seventh Circuit was unimpressed with such a "specious argument" in G.H. Miller & Co. v. United States, 260 F.2d 286, 296 (7th Cir. 1958), cert. denied, 359 U.S. 907 (1959). The Court of Appeals stated therein that (emphasis in original)

> "if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made an allowable judgment in its choice of remedy and ordinarily the Court of Appeals has no right to change the penalty. . . ."

The Supreme Court cited this holding with approval in Butz v. Glover Livestock Commission Co. Inc., 411 U.S. at 187, and went on to say:

> "The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."

Id.[34/] See also, Hiller v. Securities and Exchange Commission, 429 F.2d 856, 858

34/ The cases cited by Sundheimer for this disparity (S. Br. 44-45) are in any event plainly distinguishable. Cf. Sartain v. Securities and Exchange Commission, 601 F.2d 1366, 1375 (9th Cir. 1979).

In re Romoff, 31 Agric. Dec. 158 (1972), involved failure to file reports, in violation of the Commodity Exchange Act, for which a cease and desist order was entered and Romoff was prohibited from trading on or subject to the rules of any contract market for a period of three years. This is a year longer than Sundheimer has been prohibited from trading for a far more egregrious violation of the Act. Furthermore, In the Matter of Richardson Securities, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,842 (June 15, 1979) and In the Matter of the Siegel Trading Company, Inc. [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,452 (July 26, 1977) are initial decisions by Administrative Law Judges, not the Commission, and In the Matter of Richardson Securities, Inc., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,810 (April 16, 1979) is an acceptance of a settlement offer.

(2d Cir. 1970) in which this Court reiterated its decision in Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 110 (2d Cir.1967), stating that

> "even if the penalties were disproportionate, 'it is irrelevant because the sanctions imposed upon the petitioners were well within the Commission's discretion.' A fortiori, we cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding."35/

35/ Sundheimer places special emphasis on the relatively slight sanctions imposed pursuant to settlement of allegations of market manipulation In the Matter of Hugh P. King, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,211 (CFTC 1976). (S. Br. 46 n.1). In its Opinion and Order accepting King's offer of settlement, the Commission acknowledged that "due to factors particularly unique to [that] case" it had decided to accept the offer imposing sanctions "which it considers to be less severe than ordinarily would be applied" in a contested manipulation case. Id. at p. 21,153. The Commission cautioned, however,

> "In this regard, the Commission wishes to emphasize that the settlement herein shall have no precedential effect whatever either from the standpoint of sanctions imposed or in settlement of pending cases. The staff is, accordingly directed to disregard this less strigent sanction in its analysis of what is an appropriate remedy in any cases before it or in its determination of what would be an acceptable settlement of a pending case. Persons having pending matters before the Commission are therefore advised that in the future the Commission will only impose substantially increased sanctions in cases of this type.

Id. at p. 21,154 (emphasis added).

Finally, nothing is present similar to the "special circumstances" cited by this Court in limiting an administrative sanction of the Securities and Exchange Commission. Arthur Lipper Corp. v. Securities and Exchange Commission, 547 F.2d 171,184-185 (2d Cir. 1977), cert. denied, 434 U.S. 1009 (1978).

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CONCLUSION

For all the foregoing reasons, this Court should affirm the Commission's Opinion and Order in all respects.

Respectfully submitted,

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81-4186

To be argued by
JOHN M. BURNS, III

United States Court of Appeals

FOR THE SECOND CIRCUIT

STEPHEN M. SUNDHEIMER,
Petitioner,

—against—

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

ON PETITION FOR REVIEW FROM THE
COMMODITY FUTURES TRADING COMMISSION

REPLY MEMORANDUM ON BEHALF OF PETITIONER

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B. In respect of the revocation of the floor broker registration (the "Revocation"):

5. Whether the Seven Year Rule and the "any doubt" rule made a sham and mockery of the hearing on rehabilitation and mitigation?

6. Whether there was substantial evidence that Mr. Sundheimer "can [now] be trusted" (C.Br. p.18)?

C. In respect of both the Sanctions and the Revocation:

7. Whether the CFTC's conceded imposition of substantially harsher Sanctions and Revocation on Mr. Sundheimer than upon Pressner's more active participant, Mr. Nordlicht, who presented no evidence of mitigation and rehabilitation, establishes that the CFTC behaved arbitrarily and capriciously?

The C.Br. misstates and twists facts and relies upon these misstated and twisted facts to support otherwise unsupportable charges against Mr. Sundheimer (see infra, p.6). More significantly, however, the C.Br. deliberately courts confusion

(a) between the legal issues surrounding the Revocation and Sanctions; and

(b) between the sole violation of the Act claimed by the CFTC -- "tantamount to 'accommodation trades'" -- and other CFTC disclaimed wrongdoings -- prearranged trading and manipulation -- which the CFTC properly held were not chargeable against Mr. Sundheimer but which appear to be the major topic of the C.Br.

Petitioner submits that the CFTC's effort to confuse

REPLY MEMORANDUM ON BEHALF OF PETITIONER

THE ISSUES AS NOW FRAMED BY THE BRIEFS

Overt and discreet concessions of the CFTC* Brief (the "C.Br.") permit the refinement of certain issues on this review as follows:

A. In respect of the trading prohibition, fine and cease and desist order (the "Sanctions"):

1. Whether the CFTC's tacitly conceded denial of Mr. Sundheimer's constitutionally protected right of notice of the actual charges against him alone requires vacatur of the Order?

2. Whether the CFTC's overt concession (C.Br. p.17 n.23)** that the criminal pleading colloquy upon which it relies to support summary disposition was "only partial" as to the time of the transactions defeats the CFTC claim that it summarily established transactions occurring after crude oil futures became subject to regulation?

3. Whether the CFTC's resort to the Tantamount Holding is a wrongful and deliberate attempt to expand its jurisdiction beyond that authorized by the Act?

4. Whether the term "accommodation trade" has any meaning whatsoever and whether any acceptable meaning is applicable to the subject transactions?

---

* Terms defined in Mr. Sundheimer's Brief in Chief ("S.Br.") shall be used herein with the same meaning.

** The CFTC also tacitly concedes that words would have to be added to the colloquy for it to support summary disposition (C.Br. p.23, see infra, p.14).

merely dramatizes the weaknesses in the CFTC's position on this appeal. Accordingly, the petitioner requests that the Court on this review give particular attention to the significant statutory distinctions between the grounds for the Sanctions and the grounds for Revocation. A floor broker registration may be revoked upon the conviction of a felony, after a determination as to rehabilitation and mitigation. The felony conviction itself bears no relevance to the Sanctions. The Sanctions may be imposed only upon a showing of a violation of the Act, which showing, petitioner submits, was not made in the present proceeding.

Petitioner also requests that the Court on this review pay particular attention to the facts that

(a) prearranged trading per se is not a violation of the Act and, indeed, is specifically authorized under certain circumstances by Reg. 1.38 of CFTC's General Regulations,*

(b) the CFTC specifically and properly found that manipulation was not proved against Mr. Sundheimer (JA.12,16 and, in particular, n.10), and

(c) no charge of conspiracy was ever made against Mr. Sundheimer in the criminal or the CFTC proceeding.

Therefore, the extensive discussions of prearrangement, conspiracy and manipulation which permeate the entire C.Br. (C.Br. pp.6,7,8, 9,10,12,17,18,22,23,24,25,28,30) respond to sham issues and bear

* The only prohibition of any form of prearranged trading is contained in Reg. 1.38. Mr. Sundheimer was not charged with a violation of Reg. 1.38 (See complaint, JA.28).

no relevance whatsoever to the true issues respecting the Sanctions. The true issues are concerned only with the determination whether Mr. Sundheimer aided something "tantamount to" an accommodation trade.

AREAS OF AGREEMENT BETWEEN THE PARTIES

The C. and S. Briefs establish substantial areas of tacit agreement between the parties (either because the CFTC attempted no response to the S.Br. statement or because the CFTC response inadequately addresses the issue) as follows:

1. The criminal conviction itself relates only to the Revocation on the grounds of unfitness and in itself is not ground for the Sanctions (no CFTC response).

2. The Sanctions and the Revocation deprive Mr. Sundheimer of substantial constitutionally protected rights which may not be abridged without due process of law (no CFTC response).

3. Due process of law requires meaningful notice and a meaningful hearing (no CFTC response).

4. Meaningful notice of charges is an absolute right in an agency proceeding because a party is entitled to answer charges against him at every step of the proceeding. Mr. Sundheimer was not notified that summary disposition would be sought or sustained on the ground that he had aided an accommodation trade or its tantamount (no CFTC response).

5. A plea of guilty to a multi-element single count charging instrument does not establish by collateral estoppel any one of the multi-elements of the single count (inadequate CFTC

response, see p.15, infra).

6. The colloquy between Judge Broderick and Mr. Sundheimer upon which the CFTC relied to sustain summary disposition "is only partial as to the four, or more, year scope of the conspiracy ***" [emphasis added] (C.Br. p.17 n.23) and would have required the addition of the words "tax losses for a second year" (C.Br. p.23) to make the plea statement an unambiguous admission by Mr. Sundheimer of a violation of the Act.

7. Crude oil futures contracts did not become regulated or subject to CFTC jurisdiction until April 21, 1975 (specifically conceded, C.Br. p.7).

8. Prearrangement per se is not prohibited by the Act and is permitted under certain circumstances by the General Regulations of the CFTC. ("Similarly, Rule [Reg.] 1.38, 17 C.F.R. 1.38 has long prohibited most prearrangement * * *" [emphasis added] C.Br. p.24).

9. Summary disposition motions are analagous to summary judgment motions and should be denied under the same circumstances that a summary judgment motion should be denied (no CFTC response).

10. The Act does not prohibit acts "tantamount to" a prohibited act (inadequate CFTC response).

11. Substantial legislative history establishes the meaning of "accommodation trade" and requires the element of fictitiousness (no CFTC response). The same is true of the agency case law which has defined accommodation trades (inadequate CFTC response, see infra, p.19). The transactions involved in this

proceeding were not fictitious (no CFTC response).

12. The CFTC has no authority to impose sanctions except for an act prohibited by the Act (no CFTC response).

13. In imposing the Revocation, the CFTC relied on the "any doubt" standard and its rule, announced for the first time in the present proceeding, that seven years was too short a period to permit rehabilitation (conceded by CFTC, C.Br. pp.16,20).

14. Mr. Nordlicht was the prime actor on behalf of Pressner and even Pressner was merely an aider and abettor. Mr. Sundheimer's role was a passive one. Yet, the CFTC prohibited Mr. Sundheimer from trading for twenty-four months and prohibited Mr. Nordlicht for only three. Mr. Sundheimer was fined $100,000 and Mr. Nordlicht only $75,000. The Revocation is permanent; Mr. Nordlicht's floor broker registration revocation is for only two years (no CFTC response).

THE FACTS MISSTATED AND TWISTED IN THE C.BR.

The C.Br. is replete with factual error and twisted premises not supported by the record. Petitioner submits that the necessity to misstate and twist facts dramatizes the inherent weaknesses of the CFTC position on this review.

Pressner was not "Sundheimer's company" (C.Br. p.6 n.9) as Mr. Sundheimer owned no stock in Pressner (JA.530). There is no evidence that Pressner gained any profits from the subject transactions as claimed at C.Br. p.6 n.9. Indeed, the testimony relied upon by the CFTC to support this claim is "I don't think that that's right" (JA.475). Mr. Sundheimer's testimony strongly suggests that he was not present when any cash may have been

distributed (JA.474-5) and his lack of knowledge of these transactions reflected by the foregoing testimony indicates that he surely did not "preside" at any such meeting as claimed at C.Br. p.6 n.9.

Although the ALJ may have found that Mr. Sundheimer gave "careful attention to the mechanics of the trading" and that "Respondent's reasons for the activities * * * were to acquire financial gain" (C.Br. p.7), these conclusions are not in any way supported by the foregoing testimony or any other evidence in the record. The ALJ's decision is tainted by this error.

The prosecutor most familiar with Mr. Sundheimer's involvement advised Judge Broderick that Mr. Sundheimer "was not intimately involved in the operation of the scheme". (JA 558). The fact that Mr. Sundheimer knew after the fact that Prestner (the "we" in the testimony at C.Br. p.17) took lawful steps ("butterfly straddles") to limit risks of price fluctuation does not mean Mr. Sundheimer was involved in those steps at the time they were taken. The fact that such steps were taken does suggest little reliance on others' ability to manipulate markets.

The testimony of the witnesses as to Mr. Sundheimer's good character was not "based on knowledge gained prior to 1975" (C.Br. pp.8,19) nor was it "limited to Sundheimer's capability as a floor broker" (C.Br. pp.8,19) although, admittedly, that is what the ALJ erroneously concluded (JA.521) and his decision may be impeached for this erroneous conclusion.

Indeed, the testimony at the appendix citations listed at C Br. p.19 to support the CFTC's erroneous claim that the

highly credentialled witnesses testified on past knowledge clearly establishes that the views expressed by these witnesses were based upon both their past and their contemporaneous knowledge of Mr. Sundheimer*. The testimony at the appendix citations at C.Br. p.19 to support the CFTC's contention that these witnesses were not familiar with Mr. Sundheimer's conviction instead show remarkable familiarity with his conviction**.

* The following testimony contained at the appendix citations actually referred to by the CFTC at C.Br. p.19 for the claim of past tense testimony clearly refers to the witnesses' present tense opinion of Mr. Sundheimer.

Rubin: "I would not have any reservation about continuing to use him as a floor broker." (JA.183)

Corby: "I have ongoing contacts with him *** at least a couple of times a week." (JA.192)

Stern: "I have occasion to meet Mr. Sundheimer very frequently." (JA.211)

Herman: "Q.: Do you presently have an opinion? *** A.: *** extremely honest, reliable, competent broker and a good human being." (JA.269)

Mierefeld: "[H]e's known to be an honest broker." (JA.285)

Geraghty: "They prefer to use him". (JA.302)

Mintz: "I would use him in the future." (JA.511)

** The following testimony contained at the appendix citations actually referred to by the CFTC at C.Br. p.19 for the claim that the witnesses lacked knowledge of the conviction establishes that the witnesses had extensive knowledge of Mr. Sundheimer's conviction:

Rubin: "Q. Have you -- do you know of his conviction -- with respect to the crude oil?"
"A. Yes, I do." (JA.182)

Corby: "Q. Now concerning Mr. Sundheimer's conviction in crude oil, how did you become aware of that?"
"A. I first became aware of it on the C & S reporting of the indictment."

In respect of the CFTC's erroneous contention that the testimony was "limited to Sundheimer's capability as a floor broker" (C.Br. p.8) petitioner respectfully refers the Court to

(footnote cont'd)

Corby: "Q. Was he indicted?"
"A. I believe so. I'm not sure if that's the exact phrasiology, but there were some articles on C & S."
"Q. And he was named in those articles?"
"A. Yes." (JA.199-200)

Stern: "Q. Do you know that he was convicted in connection with crude oil trading?"
"A. I've heard of it, yes. I know of it."
* * *
"Q. Now are you aware of the details of his conviction in the U.S. District Court?"
"A. Not exactly; I know that he had pleaded guilty to a charge, but I don't know the details."
"Q. Do you know what it involved at all?"
"A. I understand that it involved some tax matters."
"Q. Do you know whether it was related to futures trading?"
"A. Yes, I think it had something to do with with futures trading." (JA.213,218)

Herman: "Q. You know, do you not, that he was convicted?"
"A. Yes."
"Q. Do you know that it related to tax concerns?"
"A. Yes."
"Q. And it was a felony?"
"A. Yes."
"Q. Do you know whether it was involved with any commodity futures trades?"
"A. It was involved with crude oil trade." (JA.269)

Mierefeld: "Q. Well, do you know of the conviction?"
"A. Yes, I do."
"Q. Do you know the conviction involved aiding and abetting false tax returns filing?"
"A. Yes, I do."
"Q. Do you know it involves -- which involved manipulated trades in crude oil?"
"A. Yes." (JA.284)

the quotations included at S.Br. pp.38-41 and note the constant repetition throughout this quoted testimony of the words "honest," "trust," "faith," "integrity," "open," "public interest," "reliable" and "good human being". Indeed, this testimony goes directly to the issue which the CFTC now concedes is the proper issue: "whether he established he can be trusted" (C.Br. p.18). In view of the substantial highly credentialled and unrebutted testimony in his favor, Mr. Sundheimer clearly met that test.

(footnote cont'd)

Geraghty: "Q. Are you aware of the fact that Mr. Sundheimer was convicted of a felony?"
"A. Yes."
"Q. And the nature of the felony?"
"A. Well, more or less. I mean I read what they had in The Times and on the Commodity News Service."
"Q. Would you tell the Court what you know?"
"A. It was manipulation of money, as I understand it, through the use of crude oil futures." (JA.303)

Sanborn: "Q. Now, do you know that he was convicted of a felony?"
"A. Yes."
"Q. Do you know what it involved -- it involved the trading in crude oil futures?"
"A. Yes."

* * *

"Q. The knowledge of Mr. Sundheimer's conviction that you have, where did you learn about his conviction?"
"A. I'm not sure exactly. I might have heard it from Mr. Sundheimer or I might have heard it from someone else in the business I was aware of what was going on."
"Q. You mean you were aware of the investigation?"
"A. I was aware of the trial."
"Q. Of the trial."
"A. Uh-huh."
"Q. So was that about when you first learned about the matter -- the crude oil matter -- was when the trial was taking place?"
"A. Probably just before the trial, when it was publicized." (JA.323-4,328)

The CFTC's most egregious twisting of fact occurs in its attempt to find some testimony in the record to cast some slight doubt upon Mr. Sundheimer's trustworthiness: Mr. Aspinwall's obvious shock and hurt over learning of alleged dereliction by a man for whom he obviously had a deep and paternal affection (C.Br. p.19 n.24). The CFTC deliberately withholds from the Court, however, the facts that (a) Mr. Aspinwall readily acknowledged knowledge of the conviction and that it did not adversely affect his opinion of Mr. Sundheimer's "honesty and integrity" (JA.337) and (b) what troubled Mr. Aspinwall was his cross-examiner's confronting him with the fact that "in this proceeding" Mr. Sundheimer "had been found to have violated the wash sales and fictitious trading and prearranged trading provisions" (JA.343), claims which in part were then, and in remaining part later proved to be, untrue. Indeed, the DE's constant confrontation of the character witnesses with these findings of violation which were, or were later held by the CFTC to be, erroneous, deprived the rehabilitaiton hearing of any semblance of fairness. (JA.204-5,220,276,293-5,315-6,329-32,397,429-30)

Contrary to the CFTC contention at C.Br. p.8, there was no evidence of any wrongful conduct after April 21, 1975; nor did Mr. Sundheimer admit "to such conduct through July 1976" (C.Br. p.9)*, nor is the fact of prearrangement itself a violation of the Act (C.Br. p.9).

Although the CFTC may have felt that the evidence did not persuade that Mr. Sundheimer "posed 'no unreasonable

* Indeed, the CFTC admits there was no such admission. (C.Br. p.17 n.23).

risks ***'" (C.Br. p.9 n.11), there was no evidence to support this feeling and feelings alone are not sufficient for an agency determination.

Although "prearranged trading" may strike the CFTC as "'nearly as egregious as market manipulation'" (C.Br. p.10) the Act does not prohibit prearrangement and the CFTC permits it by its own regulations. Reg. 1.38 of the CFTC's General Regulations.

Contrary to the innuendo of C.Br. p.16 the CFTC's 1980 Annual Report shows that it processed 3,076 floor broker registrations in 1979 and 4,015 in 1980. In any event, agency overwork is not an adequate ground to deny a person due process of law.*

I

THE CFTC CONCEDED ABSENCE OF PRIOR NOTICE OF THE CHARGE AGAINST HIM PREJUDICED MR. SUNDHEIMER

The C.Br. tacitly acknowledges that no notice was given Mr. Sundheimer that he was charged with "tantamount" behavior or that summary disposition was sought on the issue whether Pressner aided an accommodation trade or its "tantamount" until the actual CFTC decision that the transactions were "tantamount to 'accommodation trades'" (See S.Br. pp.8-9,11-14). Nor does the CFTC on this review attempt any excuse or explanation of its failure to afford Mr. Sundheimer his constitutionally protected right to prior notice.

* The CFTC has the unique advantage of a budget increase in this year of budget cuts.

The lack of notice seriously prejediced Mr. Sundheimer. He correctly ascertained that the charges specified in the summary disposition motion -- that he had prearranged trades and manipulated markets (JA.42) -- could not be sustained on the DE's own presentation. The CFTC upheld Mr. Sundheimer in this conclusion (JA.8 n.1, 16-17). Since the DE had not adequately supported its summary disposition assertions as required by §10.91 of the CFTC Rules of Practice, Mr. Sundheimer was not required to lay bare his proofs in evidentiary form to establish that he was not guilty of the violations alleged by the DE. Accordingly, Mr. Sundheimer submitted no proof, argued the motion on the law and prevailed as to the specific allegations made against him on the motion.

At his earliest opportunity to respond to the after the fact charge that his act was "tantamount to" an accommodation trade, Mr. Sundheimer submitted a factual Affidavit (JA.527 et seq.) in the context of a petition to the CFTC for reconsideration of the Order (JA.526) setting forth the facts which establish that he did not commit anything "tantamount to" an accommodation trade and that the acts which he did commit did not extend after April 21, 1975 when crude oil futures contracts first came under federal regulation.

The CFTC rejected Mr. Sundheimer's proffer of factual evidence on the ground that a petition for reconsideration

> "must be confined to new questions raised by the opinion or order and concerning which the petitioner had no opportunity to argue before the Commission." (JA.23)

Mr. Sundheimer not having been charged at any prior stage of the proceeding with any act "tantamount to" an accommodation trade, the CFTC's rejection of Mr. Sundheimer's factual presentation on the foregoing grounds was ironic and callous, Mr. Sundheimer was thereby wrongfully deprived of his substantial consitutional right to prior notice to enable him to establish his substantial consitutional right to a hearing.

II

THE CFTC'S CONCESSIONS AND ARGUMENT EVASIONS DRAMATIZE THAT MR. SUNDHEIMER'S GUILTY PLEA AND PLEA STATEMENT FALL SHORT OF ESTABLISHING A VIOLATION OF THE ACT

The CFTC acknowledges that Mr. Sundheimer's oral plea statement "of course, is only partial as to the four, or more, year scope of the conspiracy set forth in the information." [emphasis added] (C.Br. p.17 n.23). It also concedes that Judge Broderick would have had to question Mr. Sundheimer in terms referring to "two of the oil company's tax years" (C.Br. p.17) or "tax losses for a second year"* (C.Br. p.23) if the colloquy were to establish transactions extending into the period in which crude oil futures became regulated. In view of the CFTC acknowledgment at C.Br. p. 17 n.23, it is difficult to understand why in the main text of the C.Br. the CFTC insists on claiming that Judge Broderick referred to tax losses in two years. Judge Broderick never used those words or any words like them (S.Br.

* Tax straddles required transactions in two tax years: the initial transaction and a liquidating transaction early in the next year (JA.15 n.7).

p.5, JA.77). Accordingly, the pleading statement forms no basis for the grant of summary disposition (see discussion at S.Br. pp.17-25).

In arguing that the mere fact of the plea itself to the multi-element, single count Information establishes a violation of the Act after its effective date, the CFTC evades the issue. Substantial authority establishes that a mere plea to a single count, multi-element charging instrument, where, as here, conviction of any one element would be sufficient to sustain conviction under the instrument, does not establish any particular element charged (S.Br. pp.15-17). In face of this substantial authority the CFTC evades the issue by referring only to United States v. Rubin, 243 F.2d 900 (7th Cir. 1957) and the concurring minority opinion in Metros v. United States District Court for the Northern District of Colorado, 441 F.2d 313 (10th Cir. 1970) (C.Br. p.21).

Rubin, supra, involved a three count indictment. The court held only that a plea of guilty to the entire indictment established the essential elements of each count. In the present case, however, numerous possible grounds for a conviction at numerous possible times were intermixed in one count. Mr. Sundheimer's mere plea of guilty did not identify which possible violation he admitted or when it occurred and Rubin is therefore not relevant to the issues of this review.

Metros, supra, was a civil action for damages for wrongful issuance of a search warrant. The concurring opinion cited by the CFTC held only that the concurring judge would

limit the opinion to the issue of privilege because "the validity of the antecedent search is not shown *** to have been an issue essential to the conviction". 441 F.2d 318. Petitioner is at a loss to understand what such a minority opinion has to do with the issues now before this Court.

Accordingly, neither the fact of the plea nor Mr. Sundheimer's plea statement establishes any act in violation of the Act or that any act alleged occurred after the Act became applicable to crude oil fututes, and the CFTC's misleading discussion of the law and confusing discussion of the facts serves only to emphasize the CFTC's awareness that there is an unresolved factual issue as to what occurred and when it occurred and that summary disposition was erroneously granted and Mr. Sundheimer denied a hearing in violation of constitutional right.

III

THE CFTC CANNOT JUSTIFY ITS ATTEMPTED EXTENSION OF ITS JURISDICTION UNDER THE TANTAMOUNT HOLDING

The C.Br. addresses the CFTC's resort to the Tantamount Holding only once, and then in a short footnote (C.Br. p.29 n.32) suggesting that the Tantamount Holding is an "obvious semantic variation" of "of the character of" and "hardly *** an attempt *** to expand the statute." The CFTC had full opportunity on the reconsideration motion to correct the semantic variation and it chose not to do so. Since service of the S.Br. the CFTC has made no attempt to withdraw or clarify the Order. One must

assume that an agency deliberately says what it means, particularly where, as here, the agency takes more than one year to issue its decision. This being so, one must assume the CFTC deliberately set out to expand its jurisdiction.

"Of the character of" does not mean "tantamount to". "Of the character of" requires all the elements of a specific subject referred to as of a particular time (S.Br. p.27 n.); "tantamount to" suggests "not quite", and in this sense they are opposites. Should this expansion be sustained, how many agencies would be delighted to employ a similar device to escape the strictures constitutionally placed on their disciplinary powers (see S.Br. pp.30-33)? Even the affirmance without opinion of the already published, 2 Comm. Fut. L. Rep. (CCH) ¶21,245, "Tantamount Holding" is a green light to any other agency desiring to broaden its jurisdiction.

IV

THE CFTC FAILED TO CONCEIVE A NON-VAGUE DEFINITION OF "ACCOMMODATION TRADE" AND FAILED TO SHOW THAT ANY PROPOSED DEFINITION WOULD APPLY TO MR. SUNDHEIMER

The C.Br. alternately argues that "accommodation trade" should be defined in its "everyday meaning"* as "to assist another" in anything (C.Br. p.26) or as trades "outside the competitive scheme of the commodity futures market for the purpose

* No dictionary defines the term or defines "accommodation" as "assist". Contrary to C.Br. p.28, there is no "common usage of the term" accommodation trade. There was no testimony or other evidence below as to any "usage" of the term (See S.Br. p.7 n.).

of enabling or assisting another in an illegal trade." (C.Br. pp.28-29). The CFTC points to three related agency decisions which do not define "accommodation trades" as suggested in the C.Br. and which require fictitious trading as part of the definition, an element absent here. The C.Br. ignores the definitions of the Act's legislative history.

The first CFTC proposed definition, that of assisting another to do anything, is obviously too simplistic and incomplete to define a violation. The second definition, that of enabling or assisting another in an illegal trade also cannot be the meaning intended by §4c(a) since aiding, abetting, counselling, commanding, inducing or procuring an illegal trade is prohibited by Section 13(a) of the Act [7 U.S.C.A. §13c] and the definition here argued for by the CFTC would make the term "accommodation trade" merely a weak redundancy of the prohibition of Section 13(a).

Much of the CFTC's discussion of accommodation trading is in actuality a discussion of the desirability of conducting auction markets by open outcry and competitive bidding as mandated in most circumstances by Reg. §1.38 of the CFTC's General Regulations. There is no claim or showing, however, that the transactions which are the subject of Mr. Sundheimer's alleged activity were conducted in any manner other than "openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring *** during the regular hours prescribed by the contract market for trading in such commodity ***." Reg. §1.38 of the

CFTC General Regulations. Nor was Mr. Sundheimer charged in the DE complaint with any violation of Reg. 1.38 (JA.28-30). Accordingly, that discussion is not relevant to the present appeal.

Rejecting the clear definition of the Act's legislative history, the CFTC proposes three alternate means commonly used to determine the meaning of a statutory term in the absence of a clear statutory definition or definition by legislative history (C.Br. p.26): "common understanding" (absent here), "prior judicial construction" (also absent here) and "trade usage" (egregiously absent here since expert testimony could have been provided). As set forth at S.Br. pp.27-30 the legislative history of the Act is replete with definitions of accommodation trading which do not include any act which is the subject of the present proceeding, and there is no acceptable reason to exclude the legislative history of the Act as a preferred method where it clearly and copiously exists.

Moreover, the Marks and Eisen cases relied upon by the CFTC at C.Br. pp.27-28 in an attempt to expand and broaden the established definition of accommodation trade, deal with fictitious trades which the CFTC has specifically determined were not involved in the present proceeding (JA.16 n.9). In re Laiken, 23 Agric. Dec. 1193 (1964), cited by the CFTC at C.Br. p.28 n.31, does not deal at all with an accommodation trade and the term is not used in the decision by the Judicial Officer or in the decision on the review by this Court. Accordingly, the agency case law cited by the CFTC in an attempt to expand the definition of accommodation trade created by the legislative history of the

Act does not expand that definition to include the transactions which are the subject of the present proceeding.

The CFTC argues for an interpretation of the Act which favors its constitutionality (C.Br. pp.25-26). So does Mr. Sundheimer on this review, but Mr. Sundheimer argues that such an interpretation requires that the acts which are the subject of this proceeding be deemed not to be included in the term "accommodation trade" for the very purpose of preserving the constitutionality of the prohibition.

The CFTC's reliance upon United Housing Foundation, Inc v. Forman, 421 U.S. 837 (1975), is misplaced. By determining that a housing cooperative offering plan was not included within the securities laws' definition of "securities" and thereby limiting the jurisdiction of the Securities Exchange Commission, the Supreme Court did not adopt an expansive definitional rule authorizing agencies to expand statutory definitions over the years to give meanings to regulatory statutes never intended by Congress.

Mr. Sundheimer agrees that the test of whether an act is an accommodation trade "must largely be a practical one". (C.Br. p.28). The most practical test is to refer to the established definitions of "accommodation trade" and determine that they do not include the transactions which are the subject of this proceeding. The most practical test avoids the issue of constitutional vagueness.

V

THE CFTC'S SEVEN YEAR RULE MADE A SHAM OF MR. SUNDHEIMER'S HEARING ON REHABILITATION

Sixteen highly credentialled witnesses voluntarily testified to Mr. Sundheimer's present trustworthiness, the issue which the CFTC concedes was the issue with respect to the Revocation (C.Br. p.18). No one testified against. The only testimony which appears at first glance to have been shaken was that of Mr. Aspinwall cited at C.Br. p.19 n.24. But Mr. Aspinwall was shaken by a misrepresentation by the cross-examiner (see supra, p.11)*.

The Seven Year Rule means that there was no way to show Mr. Sundheimer's trustworthiness or that showing it by "extensive testimony" (C.Br. p.8) was a useless act. Accordingly, the Seven Year Rule, announced after the fact of the "extensive testimony" made a sham and mockery of the hearing. Why deceive Mr. Sundheimer into the embarrassment of asking his high ranking admirers for this "extensive testimony"? Why put him through the expense of a hearing? Why put an agency, which complains it has too many applications to process (C.Br. p.16) to the extent of holding and reviewing the hearing? The reason is that the CFTC is required to hold a meaningful hearing. The Seven Year Rule

* Contrary to the CFTC's contention in its footnote 24, Mr. Stern did not testify indicating "that a 'mere' run in with the criminal and regulatory authorities raises no questions in his mind as to a person's fitness" (C.Br. p 19 n.24). Mr. Stern testified that some exchange disciplinary proceedings involve serious infractions and some do not (JA.220-2).

made a mockery and sham of this hearing (see S.Br. pp.36-44), and Mr. Sundheimer was thereby wrongfully deprived of his right to a meaningful hearing.

VI

THE CFTC FAILED TO JUSTIFY THE IMPOSITION OF ITS HARSHEST SANCTIONS

The Sanctions are the harshest permitted under the Act as is the Revocation. The sole justification in the C.Br. for this admittedly harsh punishment is the claim that "prearranged trading, 'is nearly as egregious as market manipulation'"* (C.Br. p.10). Of course, "prearranged trading" is not mentioned in or prohibited by the Act, which is curious for such an "egregious" offense.

Rarely, perhaps never, is a Court presented with a situation where a primary offender who offers no evidence of mitigation or rehabilitation is sanctioned with so much more lenience than a passive acquiescor who came forward, impressed the prosecutor that he was not "intimately involved", cooperated performed public service diligently and offerred such substantial evidence of rehabilitation. The CFTC's sanctions undercut Judge Broderick's considered determination to punish Mr. Sundheimer at half the penalty he imposed on Mr. Nordlicht. The Sanctions and

* The statement in the C.Br. of the quotation from the Order is misleading. The Order did not at JA.20-21 refer to "prearranged trading" although the remainder of the quoted language is there

Revocation are grim warnings to the industry: Woe to ye who burden the CFTC with the exercise of your constitutional and statutory rights! The CFTC clearly acted arbitrarily and capriciously in imposing the Sanctions. (See S.Br. pp.44-48).

CONCLUSION

The CFTC appears as an agency run wild. It has denied Mr. Sundheimer his substantial constitutional rights to prior notice and an evidentiary hearing. It has exceeded its statutory authority. It made a sham of Mr. Sundheimer's hearing on rehabilitation. It imposed sanctions in a manner defying human understanding. The Order should be vacated.

Respectfully submitted,

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